Petition

81-1300
No.

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In The

Supreme Court of the United States

October Term, 1981

CALVIN REX,

Petitioner,

vs.

CIA. PERVANA DE VAPORES, S.A. ; UNITED STATES OF AMERICA,

Intervenor-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does not the Seventh Amendment's guarantee of the right to trial by jury extend to a suit for damages for negligence against a corporation the stock of which is owned by a foreign country, and to the extent that the Foreign Sovereign Immunities Act, 28 U.S.C. §1330(a), would deny the right to a jury trial in such an action, is it not unconstitutional?

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UNITED STATES OF AMERICA, Intervenor,
Respondents

Petition for a Writ of Certiorari to
the United States Court of Appeals
For the Third Circuit

To the Honorable, the Chief Justice and the
Associate Justices of the Supreme
Court of the United States

Petitioner, Calvin Rex, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the

Third Circuit entered on September 17, 1981, denying petitioner the right to a jury trial in the within proceeding, and in support thereof represents as follows:

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Third Circuit, which are not yet officially reported, are reproduced in the Appendix hereto (1a,20a). The opinion of the United States District Court for the Eastern District of Pennsylvania is officially reported at 493 F.Supp. 459 (E.D.Pa. 1980), and is reproduced in the Appendix hereto (39a).

JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit was entered on September 17, 1981 (35a). Thereafter, on October 22, 1981, a Petition for Rehearing was denied (37a). The jurisdiction of

this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the Constitution of the United States provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATUTORY PROVISIONS INVOLVED

Foreign Sovereign Immunities Act

28 U.S.C. §1330. Actions Against Foreign States

> "(a) The district courts shall have original jurisdiction without regard to amount in controversy of any non-jury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.
>
> ". . ."

28 U.S.C. §1603, Definitions

"For purposes of this chapter--

(a) A 'foreign state', except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An 'agency or instrumentality of a foreign state' means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

". . . "

28 U.S.C. §1604. Immunity of a Foreign State from Jurisdiction

"Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the

"courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."

28 U.S.C. §1605. General Exceptions to the Jurisdictional Immunity of a Foreign State

"(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) . . .

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) . . .

(4) . . .

(5) Not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death or damage to or loss of property, occurring in the United States and caused by the tortious act or

"omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

28 U.S.C. §1606. Extent of Liability

"As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; . . . "

STATEMENT OF THE CASE

The issue sought to be reviewed by this Petition is whether the denial of the right to a jury trial in tort actions brought against corporate entities owned by foreign governments, which the court below found to be mandated by Section 2(a) of the Foreign Sovereign Immunities Act, 28 U.S.C. §1330(a), is unconstitutional under the Seventh Amendment to the United States Constitution.

Petitioner, an American citizen, working for an American employer, was injured while working as a longshoreman in an American port -- the port of Philadelphia, Pennsylvania -- and engaged in discharging cargo from a commercial merchant vessel owned and operated by respondent, Cia. Pervana de Vapores, S.A. Alleging that his injuries were caused

by respondent's negligence, petitioner instituted suit in the United States District Court for the Eastern District of Pennsylvania pursuant to §5(b) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §905(b). Federal jurisdiction was predicated on 28 U.S.C. §1332, diversity of citizenship, and on 28 U.S.C. §1331, an action arising under the laws of the United States, to wit, Section 5 of the Longshoremen's and Harbor Workers' Compensation Act.

Respondent, Cia. Pervana de Vapores, S.A., is a corporation organized and existing under the laws of the Republic of Peru. All the stock of respondent is owned by the sovereign state of Peru. Respondent owns and operates in commercial trade several merchant vessels including

the vessel on which petitioner was working at the time he was injured.

Upon being served with petitioner's complaint, respondent filed an answer in which it asserted the defenses customarily advanced in a longshoreman's third-party action; however, at no time did respondent advance as a defense, nor does it claim at the present time, that it was immune from liability because it was an agency or instrumentality of a foreign sovereign.*

Endorsed on the petitioner's complaint was a demand for a jury trial. After the pleadings were closed, respondent filed a motion to strike the demand for a jury

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* It is clear that the defense of sovereign immunity does not extend to commercial activities such as were involved in the instant case, see 28 U.S.C. §1605(a)(2).

trial on the grounds that, since all of its stock was owned by the sovereign state of Peru, it was an "agency or instrumentality of a foreign state" as defined in Section 4 of the Foreign Sovereign Immunities Act, 28 U.S.C. §1603, that as a consequence thereof jurisdiction over it could be asserted only under 28 U.S.C. §1330(a), and that 28 U.S.C. §1330(a) authorized only a "nonjury civil action."*

Upon being advised of respondent's motion, counsel for petitioner advised

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* 28 U.S.C. §1330(a) provides:

> "(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable agreement."

District Judge Edward N. Cahn to whom the case was assigned that should the Foreign Sovereign Immunities Act be interpreted as denying the right to a jury trial in the circumstances of the instant case, then petitioner would be challenging its constitutionality as being violative of the Seventh Amendment's guarantee of the right to trial by jury.* Judge Cahn thereupon notified the Attorney General of the United States that the constitutionality of the Act was being challenged, and, thereafter, the United States of America was permitted to intervene as a party to the proceedings.

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* The giving of such notice is required by 28 U.S.C. §2403(a) and Local Rule 20 of the United States District Court for the Eastern District of Pennsylvania.

After extensive briefing and argument, Judge Cahn filed an Opinion in which he denied respondent's motion to strike the demand for a jury trial (39a, 78a). Judge Cahn reasoned that if the Foreign Sovereign Immunities Act were to be interpreted as denying the right to a jury trial with respect to the instant claim, then he would be required to declare it unconstitutional under this Court's decisions in Pernell v. Southall Realty, 416 U.S. 363 (1974) and Curtis v. Loether, 415 U.S. 189 (1974) (56a). However, he avoided reaching the constitutional issue by construing the Foreign Sovereign Immunities Act as not depriving the federal courts of their traditional diversity and arising under jurisdiction in suits against foreign corporations even though the stock of such a

corporation might be owned by a foreign government (64a, 66a). In so ruling, Judge Cahn recognized that the issue was a difficult one and certified his decision for an Interlocutory Appeal (72a). The United States Court of Appeals for the Third Circuit, in turn, granted the Interlocutory Appeal as it was apparent that a considerable volume of litigation would be affected by the ultimate decision on the issue of the right to a jury trial.

Following briefing and oral argument, a panel of the Third Circuit reversed in a 2 to 1 decision. The panel majority (Judges Aldisert and Weis) held that the jurisdictional grant under Section 2 of the Foreign Sovereign Immunities Act, 28 U.S.C. §1330(a), was exclusive as to actions against foreign entities as defined

in Section 4 of the Foreign Sovereign Immunities Act, 28 U.S.C. §1603 (9a), and, therefore, the determination of the constitutional issue could not be avoided.

The panel majority then sustained the constitutionality of the denial of the right to a jury trial, holding that "the law of liability of foreign sovereigns is . . . sui generis", "a unique species of public law, . . . peculiar only in its characteristic of absolute judicial fealty to executive decisionmaking" (17a) (Emphasis supplied). In short, reasoned the majority, executive or congressional decisions with respect to the liability of foreign sovereigns were subject neither to judicial review nor constitutional limitation.

In reaching its conclusion, the panel majority did not find any distinction

between an action brought against a foreign state and an action brought against a corporate entity, the stock of which was owned by a foreign state. Since the Foreign Sovereign Immunities Act included within its definition of a foreign state, a corporation the majority of whose shares or other ownership interest was owned by a foreign state, 28 U.S.C. §1603(b)(2), this congressional definition also was entitled to "absolute judicial fealty", and actions against such entities were not subject to constitutional limitations.

Judge Sloviter dissented from the panel majority's decision. She reasoned that the majority decision erroneously equated the doctrine of foreign sovereign immunity with the domestic sovereign immunity of the United States (22a-24a),

and failed to differentiate between official actions of foreign states and their commercial activities (24a-29a). She further held that Congress could not grant a corporation the status of a foreign sovereign merely by defining it as a foreign sovereign. In her view, "All exercises of governmental power must be tested against the constraints imposed by the Constitution. The area of foreign affairs, however delicate, is no exception" (31a). Thus, she concluded:

> "Whether Congress chose to call the defending entities 'foreign states,' 'agencies or instrumentalities of foreign states,' or 'camels' cannot be determinative of plaintiff's Seventh Amendment right to jury trial. Where constitutional rights are at stake, the judiciary cannot play Polonius to Congress' Hamlet and so permit legislative lexicography to defeat those rights" (32a-33a).

A subsequent Petition for Rehearing was denied; however, Judges Sloviter and Gibbons voted to grant rehearing (37a-38a).

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISIONS IN REID V. COVERT, 354 U.S. 1 (1957), PERNELL V. SOUTHALL REALTY, 416 U.S. 363 (1974), AND CURTIS V. LOETHER, 415 U.S. 189 (1974), AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT -- NAMELY THE CONSTITUTIONALITY UNDER THE SEVENTH AMENDMENT OF THE DENIAL OF THE RIGHT TO A JURY TRIAL IN ACTIONS SUBJECT TO THE FOREIGN SOVEREIGN IMMUNITIES ACT.

Petitioner's action under Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b), is "a statutory negligence action", Scindia Steam Nav. Co. v. De Los Santos, 451 U.S. , 68 L.Ed.2d 1, 11 (1981). Under this Court's decisions in Pernell v. Southall Realty, 416 U.S. 363 (1974), and Curtis v. Loether, 415 U.S. 189 (1974), the Seventh Amendment's guarantee of the right to trial by jury extends to such a

statutorily created cause of action for negligence.

The panel majority in the court below, while recognizing that the Seventh Amendment's guarantee of the right to a jury trial extended to statutorily created causes of action (12a), held that where the defendant in such an action was a foreign state, then such an action was not "at common law" within the meaning of the Seventh Amendment (19a). To reach this conclusion the panel majority erroneously equated foreign sovereign immunity with domestic sovereign immunity, and articulated the novel, but legally unsound, notion that in the field of foreign sovereign immunity the role of the courts was limited to one of "absolute judicial fealty to executive decisionmaking" (17a). As forcefully set forth in the dissenting opinion, the panel

majority's decision is premised on a misreading of prior decisions coupled with a concept of judicial review which is incompatible with the preservation of constitutional guarantees and the maintaining of the role of the judiciary in our constitutional system of checks and balances.

The Third Circuit panel majority premised its decision on the mistaken assertion that "History thus conclusively demonstrates that actions against foreign sovereigns have never existed at common law" (17a). This statement is patently incorrect. Prior to the enactment of the Foreign Sovereign Immunities Act, there was no statutory authorization for suits against foreign sovereigns, yet foreign sovereigns were successfully sued with great frequency in our courts certainly following the State

Department's announcement in 1952 in the "Tate letter" that henceforth it would be applying the restrictive theory of foreign sovereign immunity in response to immunity requests from foreign governments,* and even prior thereto, see e.g., United States v. Deutsches Kalisyndikat Gesselschaft, 31 F.2d 199 (S.D.N.Y. 1929), Coole v. Societe Co-operative Suisse des Charbons, 21 F. 2d 180 (S.D.N.Y. 1921). If such actions were not "at common law", then under what law

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* The "Tate letter", 26 Dept. State Bull. 984 (1952), is reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711 (1976), as an Appendix to the opinion of the Court. The Foreign Sovereign Immunities Act was intended to be a codification of the restrictive theory. See Legislative History at 80a-81a.

were they brought?*

Correctly understood, an action against a foreign sovereign existed at common law but was subject to a discretionary declination of the exercise of jurisdiction under principles of comity, The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812), The Santissima Trinidad & The St. Andre, 20 U.S. (7 Wheat.) 283 (1822).

* The Second Circuit recently has held that the Foreign Sovereign Immunities Act operates only to confer jurisdiction. Actions do not "arise under" the Foreign Sovereign Immunities Act but rather under the substantive law determining the rights sought to be enforced, see Verlinden B.V. v. Central Bank of Nigeria, 647 F. 2d 320 (2nd Cir. 1981).

In contrast, under domestic sovereign immunity, absent a statutory waiver of immunity, there is no common law right to sue the United States. The sovereign immunity of the United States to suit in its own courts is based upon a concept of substantive liability which holds that the United States cannot be made liable in its own courts except to the extent that it chooses to make itself liable. It stems, in part, from the doctrine of separation of powers and the role of Congress in determining which of the nation's debts are to be paid and when and how they are to be paid. Since Congress has the power to determine which of the nation's debts are to be paid, and how and when they are to be paid, it can condition their payment in any manner it sees fit, including a

nonjury trial, without running afoul of the Seventh Amendment, see Glidden Co. v. Zdanok, 370 U.S. 530 (1962), United States v. Sherwood, 312 U.S. 584 (1941).

Underlying the concept of comity as applied to foreign sovereign immunity is the thought that it would be demeaning and an affront for one nation to subject another, equal nation, to the jurisdiction of its courts. It has never been suggested that it would be any more or less demeaning, or any more or less an affront, for a foreign nation to be subject to a jury trial rather than a nonjury trial in our courts; rather, it was the exercise of any jurisdiction, with its implication of subservience, that comity among equal nations prohibited.

There are no degrees of foreign sovereign immunity. Rather, a foreign

sovereign either is immune from the exercise of jurisdiction or is not immune. Neither the case law nor the policy underlying foreign sovereign immunity suggests that a foreign sovereign would have a right to assert a partial immunity, such as an immunity from a jury trial but not from a nonjury trial. Thus, contrary to the assertion of the panel majority in the court below, not only does history not conclusively demonstrate that actions against foreign sovereigns never existed at common law, but, more important, history affirmatively demonstrates that foreign sovereigns, when subjected to the jurisdiction of our courts, were subjected to that jurisdiction with all it connotes, including our form and mode of trial.

It is against the backdrop of the panel majority's faulty historic

appraisal that the correctness of the views expressed in the dissenting opinion q' ickly becomes apparent. The only way the panel majority was able to justify the denial of the right to a jury trial was to hold that foreign sovereign immunity was an area of the law to which constitutional protections did not apply -- thus the holding that it was "a unique species of public law . . . peculiar only in its characteric of absolute judicial fealty to executive decisionmaking"(17a). It is this holding, which relegates the role of the judiciary to something less than that of a rubber stamp, that Judge Sloviter found to be constitutionally unacceptable. Impressive authority in this Court supports her position.

Until the majority decision below, no case ever held that the area of foreign

sovereign immunity, or any other area of executive or congressional action, was immune from compliance with constitutional restraints. However, such an argument was made and rejected in Reid v. Covert, 354 U.S. 1 (1957). In Reid v. Covert, the issue before this Court was the constitutionality of a provision of the Uniform Code of Military Justice which provided that persons accompanying our armed forces abroad would be subject to the Military Code and its attendant denial of the right to a jury trial. It was argued that the exercise of military jurisdiction over civilian military dependants living abroad was necessary in order to maintain good relationships with the foreign nations in which our troops might be stationed. This Court rejected this position, noting that the

federal government was a government of delegated powers and could act only within the constraints of the constitution which gave it its powers. Thus, the Court stated (354 U.S. at 17):

> "It would be manifestly contrary to the objections of those who created the Constitution, as well as those who were responsible for the Bill of Rights -- let alone alien to our entire constitutional history and tradition -- to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined." (Emphasis supplied)

This Court further noted that ". . . no agreement with a foreign nation can confer power on the Congress,

or on any other branch of Government, which is free from the restraints of the Constitution" (354 U.S. at 16). In response to arguments similar to those made in the court below in the instant case that the denial of the right to a jury trial under the Foreign Sovereign Immunities Act was appropriate in dealing with those foreign nations where a trial by jury either is not recognized or does not have the same importance that it occupies under our Constitution, this Court stated (354 U.S. at 14):

> "The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written constitution and undermine the basis of our Government. If our foreign

> "commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there."

While it is true that this Court held in Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945), that "It is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize," it has never been suggested that this deference to the role of the executive in conducting foreign affairs extended to authorizing actions which did not respect the limitations contained in the constitution under which the executive was acting. Similarily, congress has no

authority to disregard constitutional limitations simply because it happens to be enacting legislation in the field of foreign affairs. The panel majority in the court below mistook its allegiance. When constitutionally ordained rights are at stake, judicial fealty is owed not to congress or to the executive, but to the Constitution, Reid v. Covert, supra.

In the instant case, petitioner has not sued the sovereign state of Peru, nor has he sued an "organ" of the Republic of Peru or a political sub-division of the Republic of Peru. The Foreign Sovereign Immunities Act defines an "agency or instrumentality of a

foreign state" having all the rights of a "foreign state", as including any separate legal person, corporate or otherwise, a majority of whose shares or other ownership interests is owned by a foreign state or political subdivision thereof, 28 U.S.C. §1603(a) and (b). Under this definition there is no requirement that the "agency or instrumentality" of the foreign state be engaged in any activity even remotely related to the business of government. Indeed, the instant defendant is engaged in the shipping business, in direct competition with shipping companies which are not government owned. Shipping is not the only commercial venture in which foreign governments participate. Many airlines are owned by corporations the stock of which is owned by foreign

governments, see Sugarman v. Aeromexico, Inc., 626 F.2d 270 (3rd Cir. 1980), Icenogle v. Olympic Airways, S.A., 82 F.R.D. 36 (D.D.C. 1979). Under the Foreign Sovereign Immunities Act's definition of "agency or instrumentality of a foreign state", there is no doubt that Renault, the French automobile manufacturer, all of whose stock is owned by the Government of France, would be entitled to invoke the Foreign Sovereign Immunities Act should it be sued in a products laibility case for an accident occurring in the United States to an United States citizen. Prior to the enactment of the Foreign Sovereign Immunities Act, no case ever held that Renault, or any other similar corporation, engaged only in commercial ventures, could invoke the doctrine of sovereign immunity when sued in our courts. Yet, if the

decision below is allowed to stand, the Foreign Sovereign Immunities Act, through the process of statutory definition, would now deprive American citizens of their right to a jury trial in such actions.

If Congress can define a foreign state for purposes of the Foreign Sovereign Immunities Act as including a corporation the majority of whose stock is owned by a foreign government, what constitutional restraint would prevent it from next defining a foreign state as including a corporation <u>any</u> of whose stock is owned by a foreign nation? Indeed, if congressional definitions are to control the availability of constitutional protections, then what would prevent the enactment of legislation which would define a foreign state as

including any corporation organized under the laws of a foreign state or any of whose stock is owned by citizens of a foreign state? Surely, Judge Sloviter must be correct in her dissent when she stated that "Where constitutional rights are at stake, the judiciary cannot play Polonius to Congress' Hamlet and so permit legislative lexicography to defeat those rights" (33a).

The decision below, if allowed to stand, will have serious and widespread impact on the basic right of American citizens to a jury trial in civil actions. In the field of longshoreman litigation, it can be conservatively estimated that 40 to 50 percent of all the ships that come into the United States' ports are owned by corporations the stock of which

is owned by foreign governments. Virtually all the South American shipping companies are so owned, the shipping companies of all the eastern European communist countries are state owned, the shipping lines of countries such as Ireland, India, Pakistan and many Arab countries are state owned. The Italian Line of Italy is state owned. As previously noted, many foreign airlines are state owned, and, undoubtedly, many foreign industrial concerns, like Renault, are state owned. Such defendants were subject to suit in our courts for years prior to the enactment of the Foreign Sovereign Immunities Act without any indication that foreign nations were complaining because their corporations were being subject to a trial by jury in this country. Indeed, under the "Tate

letter" the right to sue such corporations with the right to a jury trial was well established prior to the Foreign Sovereign Immunities Act, and there is no suggestion in the legislative history that Congress was made aware that, in enacting the Foreign Sovereign Immunities Act, it was depriving American citizens of an existing right to a jury trial in such litigation. To the extent that there is any discussion in the legislative history with respect to the jury trial issue, it relates to the desirability of insuring uniformity of decision in interpreting the provisions of the Foreign Sovereign Immunities Act itself, i.e., uniformity in interpreting the circumstances under which the defense of sovereign immunity would be recognized (87a). In the instant case, however,

the defense of sovereign immunity is not even being raised. The trial of this action will present no issue which will require interpretation of the Foreign Sovereign Immunities Act. Rather, the Act is being invoked solely for the purpose of denying petitioner the right to a jury trial. Such use of the Act seems not to have been contemplated by Congress, but whether intended or not, it is in direct conflict with the Seventh's Amendment's guarantee of the right to a trial by jury. Accordingly, it is submitted that a Writ of Certiorari should issue to review the decision below to the end that the decision below be reversed and the right to a jury trial be preserved.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the decision and judgment of the court below.

Respectfully submitted,

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Appendix

No. 81-1300

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-2335/6

REX, Calvin

v.

Cia. Pervana de Vapores, S.A.

CALVIN REX and CIA. PERVANA DE VAPORES, S.A.,
Appellants in No. 80-2335

REX, Calvin

v.

Cia. Pervana de Vapores, S.A.

UNITED STATES OF AMERICA, Intervenor,
Appellant in No. 80-2336

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 78-3694)

Argued June 8, 1981

Before: ALDISERT, WEIS, and SLOVITER, *Circuit Judges*

(Filed September 17, 1981)

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ALDISERT, *Circuit Judge*.

Before us is an interlocutory appeal certified under 28 U.S.C. §1292(b) from a district court decision granting plaintiff-appellee's motion for a jury trial. *Rex v. Cia. Pervana De Vapores, S.A.*, 493 F.Supp. 459 (E.D. Pa. 1980). The issues certified and accepted for our review

are whether all actions brought under 28 U.S.C. §1330(a), enacted as §2(a) of the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 [hereinafter referred to as FSIA], must be tried to the court without a jury, whether that act is the sole basis for federal subject matter jurisdiction in civil actions against agencies or instrumentalities of foreign sovereigns, and, if the answers to both of these questions are affirmative, whether the FSIA is consistent with the seventh amendment guarantee of civil jury trial. We resolve each of the questions in the affirmative, and therefore reverse.

I.

Because of the procedural status of the case, a detailed recitation of facts is unnecessary. Calvin Rex, the appellee, is a longshoreman who was injured while unloading cargo for the ship of the appellant, Compania Pervana De Vapores, S.A. The appellant is a Peruvian corporation, the stock of which is wholly owned by the Government of Peru. Appellee filed suit for damages under §5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b), alleging federal subject matter jurisdiction by reason of diversity of citizenship, 28 U.S.C. §1332, a federal question, 28 U.S.C. §1331, and an action against a foreign sovereign, 28 U.S.C. §1330(a). Included in his claim for relief was a request for a jury trial. The district court instructed the clerk to notify the Attorney General of the United States to allow his participation in the case.

In *Rex v. Cia. Pervana De Vapores, S.A.*, 493 F.Supp. 459 (E.D.Pa. 1980), the district court granted the demand for a jury trial. The court expressed concern that an interpretation of the FSIA, which creates federal jurisdiction over agents or instrumentalities of foreign states, as the exclusive basis for federal jurisdiction over foreign governments would unconstitutionally deprive

plaintiffs of their right to jury trial. Section 1330(a), the jurisdictional provision of the FSIA, states:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

To avoid this possible constitutional infirmity, the court concluded that 28 U.S.C. §§1331 and 1332 provide federal civil actions against the commercial enterprises of foreign sovereigns, and that the right to jury trial has not been eliminated from these sections. 493 F.Supp. at 466-69. By refusing to construe §1330(a) as the exclusive basis of federal jurisdiction, therefore, the district court obviated application of the seventh amendment to invalidate the statute.[1]

II.

The issues before us in this case have previously drawn the attention of two other courts of appeals. In *Williams v. The Shipping Corp. of India*, —— F.2d ——, No. 80-1243 (4th Cir. July 7, 1981), and in *Ruggiero v. Compania Pervana de Vapores "Inca Capac Yupanqui"*, 639 F.2d 872 (2d Cir. 1981), the courts affirmed district court orders striking jury demands on similar facts. Judge Friendly's opinion for the court in *Ruggiero* examined the relevant statutes and their legislative histories and concluded that §1330(a) constitutes the sole basis of federal subject matter jurisdiction over a foreign sover-

1. The district court certified its decision for immediate appeal under §1292(b) and urged this court to resolve this difficult problem. On August 20, 1980, a motions panel of this court granted leave to appeal. App. at 59a.

eign or its entities. The court considered and rejected the theory posited by the district court in this case. It concluded that "[t]he [House and Senate] reports thus confirm what is patent from the statutory language — Congress wished to provide a single vehicle for actions against foreign states or entities controlled by them, to wit, §1330 and §1441(d), its equivalent on removal, and to bar jury trial in each." 639 F.2d at 878.

Faced squarely with the seventh amendment question, the second circuit reasoned that the purpose of the seventh amendment is to preserve the right to jury trial as it existed in 1791 when the amendment became effective, and not to extend the right to new types of cases. Because the military and commercial operations of foreign governments were immune from suit until the middle of the twentieth century, the court concluded that the seventh amendment is inapplicable to these cases because no right of jury trial in similar cases existed when the seventh amendment became effective in 1791. *Id.* at 879. The court also analogized suits against foreign governments to suits against the United States, and noted that Congress can attach conditions to such suits as a predicate for creating federal jurisdiction over them. *Id.* at 880. It distinguished *Curtis v. Loether*, 415 U.S. 189 (1974), and *Pernell v. Southall Realty*, 416 U.S. 363 (1974) as holding "only that when Congress enlarges domestic substantive law or alters procedure in cases governed by it, the Seventh Amendment protects the right to jury trial if the new substantive right or proceeding is analogous to a suit at common law in 1791." 639 F.2d at 881 (citations omitted).

The court in *Williams* followed the *Ruggiero* analysis, holding that sections 1330 and 1441(d) are jurisdictionally exclusive and that the jury bar is constitutional. Citing *McElrath v. United States*, 102 U.S. 426 (1880), and *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830), the

court held that the seventh amendment applies only to defendants who could be sued at common law in 1791. Because the commercial vessels of foreign states were immune from suit in 1791, the action was not within the seventh amendment. We agree with the conclusions reached by the second and fourth circuits, although we arrive by a slightly different route.

III.

In accordance with the oft-cited maxim that "[n]o court ought, unless the terms of an act [of Congress] rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution," *Parsons v. Bedford*, 28 U.S. (3 Pet.) at 448, we must first examine the jurisdictional provisions of the FSIA to determine if a reasonable construction of them will avoid a conflict with the seventh amendment. *See also St. Martin Evangelical Lutheran Church v. South Dakota*, —— U.S. ——, ——, 49 U.S.L.W. 4575, 4577 (May 26, 1981); *United States v. Clark*, 445 U.S. 23, 27 (1980); *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 582-83 & n.22 (1979). This inquiry requires us to determine if Congress clearly intended to withhold jury trials in FSIA actions, and, if so, whether §1330(a) is the exclusive jurisdictional grant in this case.

A.

Section 1330(a) was intended to provide a comprehensive treatment of jurisdiction over actions against foreign states. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 14, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6613. The parties concede that appellant is a "for-

eign state" for purposes of §1330(a).[2] The parties also agree that appellant is entitled to no claim of immunity under the FSIA.[3]

Although Congress could have stated with more elegance that actions against foreign states and their in-

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2. The definitional section is 28 U.S.C. §1603, which states:

For purposes of this chapter—

(a) A "foreign state," except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

3. Exceptions to the general immunity accorded foreign governments under the FSIA appear in §1605(a)(2), relevant portions of which state:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

. . . .

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

We assume that the nature of the enterprise in this case can properly be characterized as "commercial activity carried on in the United States."

strumentalities could be litigated in federal court only to a judge sitting without a jury, we have been shown no indication that Congress intended its grant of jurisdiction over "nonjury civil action[s]" to mean anything other than a statutory denial of jury trial in these cases. *See* 1 J. Moore, Federal Practice ¶0.66[4] at 700.179-.180 (2d ed. 1980). The parallel statute, 28 U.S.C. §1441(d), which allows removal to federal court of actions filed against foreign sovereigns in state court, supports our interpretation of §1330(a). Section 1441(d) allows removal, but states that "[u]pon removal the action shall be tried by the court without jury." The clear intention of the jurisdictional revisions in the FSIA was to require trial of these actions without a jury. Although the district court held that the appellant qualifies as both an "instrumentality of a foreign state" under 28 U.S.C. §1603(a) and a "citizen" of a foreign state under 28 U.S.C. §1332(a)(2), we conclude that the legislative history forecloses this interpretation of §1332(a)(2).

B.

The district court espoused a separate theory for avoiding denial of a jury trial. Although conceding that Congress eliminated diversity jurisdiction over foreign states by explicitly amending 28 U.S.C. §1332(a)(2), the district court noted that Congress failed to amend the federal question statute, 28 U.S.C. §1331. By failing to delete actions against foreign states from the federal question statute, it reasoned that Congress thereby allowed an alternative basis of jurisdiction in these cases, to which the right to jury trial would apply. The court concluded that this action arose under the LHWCA, thus creating federal question jurisdiction.

We are unable to agree with this analysis. We have recently rejected this argument in the context of the Seaman's Wage Act, 46 U.S.C. §§596-97. *Velidor v. L/P/G Genghazi*, No. 80-2496, slip op. at 11 & n.9 (3d

Cir. June 30, 1981) (citing *Ruggiero*). Although Congress did not explicitly alter §1331, that does not end the inquiry. Appellee's argument would allow jury trials in cases presenting federal statutory or constitutional questions against foreign states, but would not allow jury trials in actions involving the same parties that were previously cognizable under the federal diversity of citizenship statute, 28 U.S.C. §1332. We find no justification in the legislative history for treating these types of cases differently. The House Report's discussion of the amendment to §1332, which formerly created diversity jurisdiction in these actions, states: "Since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous." H.R. Rep. No. 1487 at 14, [1976] U.S. Code Cong. & Ad. News at 6613. In addition, the legislative history of the FSIA discloses a clear intention to withhold jury trial in all actions against foreign states: "As in suits against the U.S. Government, jury trials are excluded. See 28 U.S.C. [§] 2402. Actions tried by a court without jury will tend to promote a uniformity in decision where foreign governments are involved." *Id.* at 13, [1976] U.S. Code Cong. & Ad. News at 6611-12; *see also* 1 J. Moore, Federal Practice ¶0.66[4] at 700.179-.180 (2d ed. 1980). We conclude, therefore, that Congress intended all actions against foreign states to be tried without a jury, and to be brought under 28 U.S.C. §1330(a).

IV.

Our resolution of the statutory issues thus requires us to confront squarely the seventh amendment issue. The intention of Congress to withhold jury trial from actions against foreign states — an intention we believe to be clear — conflicts with whatever right a plaintiff has to be heard by a jury in these cases. If that right is protected by the seventh amendment, then the jurisdictional

provisions of the FSIA must be held void as repugnant to the Constitution.

In any case in which a federal court considers the constitutionality of an act of Congress, it must be cautious to respect the "presumption of constitutionality" that is afforded acts of a coordinate branch of government. The Court has recently stated:

> Whenever called upon to judge the constitutionality of an Act of Congress — "the gravest and most delicate duty that this Court is called upon to perform," *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.) — the Court accords "great weight to the decisions of Congress." *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973). The Congress is a coequal branch of government whose members take the same oath we do to uphold the Constitution of the United States. As Justice Frankfurter noted in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 164 (1951) (concurring opinion), we must have "due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government."

Rostker v. Goldberg, —— U.S. ——, ——, 49 U.S.L.W. 4798, 4800 (June 25, 1981); *see also City of Rome v. United States*, 446 U.S. 156, 207 (1980) (Rehnquist, J., dissenting). The importance of the congressional decisions reflected in the FSIA to the nation's foreign policy also counsel against invalidation of the statute without a most persuasive demonstration of unconstitutionality. The seventh amendment issue presented by this case therefore must be considered in the context in which it arises: a congressional schema comprehensively dealing with actions in American courts against foreign sovereigns.

A.

We must first ascertain the meaning of the seventh amendment text with the judicial gloss it has received from numerous Supreme Court decisions since its ratification on December 15, 1791. The seventh amendment states in relevant part: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." U.S. Const. amend. VII. Justice Story's opinion for the Court in *Parsons v. Bedford* provides an early explication of the amendment that has been followed for over 150 years:

> The phrase "common law," found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . It is well known, that in civil causes, in Courts of equity and admiralty, juries do not intervene, and that Courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the Court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By common law, they meant what the constitution denominated in the third article "law;" not merely suits, which the common law recognized among its old and settled prodeedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit.

28 U.S. (3 Pet.) 433, 446-47 (1830).

Appellant argues, and the second and fourth circuits agree, that the seventh amendment protects only

actions recognized at common law in 1791. We do not accept this static approach to a vital constitutional guarantee. We have recently noted that

> the Court has never relied on this static view of history to confine the seventh amendment guarantee to causes of action recognized by the common law of 1791. Beginning with an 1830 decision, *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446-47, 7 L.Ed. 732 (1830), the Court has held the guarantee applicable to almost any suit, including a suit based on a statutorily created cause of action, that falls within the federal courts' jurisdiction over suits at law as opposed to suits in equity or admiralty. *See Curtis v. Loether*, 415 U.S. 189, 193-94, 94 S.Ct. 1005, 1007-08, 39 L.Ed.2d 260 (1974).

In re Japanese Electronic Products Antitrust Litigation, 631 F.2d 1069, 1078 (3d Cir. 1980). We must decide whether Rex's claim is a "Suit at common law," but we do not view common law as frozen in 1791.

Appellee stresses two recent Supreme Court decisions in particular as indicating that he has a right to a jury trial that the FSIA cannot abrogate. Both decisions implicated federal statutes that were silent on the question of trial by jury. In *Curtis v. Loether*, 415 U.S. 189 (1974), the Court unanimously held that the defendant in a fair housing action brought to redress alleged violations of Title VIII has a right to jury trial protected under the seventh amendment. After quoting *Parsons v. Bedford*, the Court explained: "The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." 415 U.S. at 194.

In *Pernell v. Southall Realty*, 416 U.S. 363 (1974), the Court held that the seventh amendment protects the right to jury trial in actions for the recovery of property in

the District of Columbia. The Court first considered that no reasonable construction of the statute at issue supported a right to jury trial, and then addressed the seventh amendment question, stating:

> Whether or not a close equivalent to [D.C. Code] §16-1501 existed in England in 1791 is irrelevant for Seventh Amendment purposes, for that Amendment requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty. See *Curtis v. Loether, supra*, at 195.

416 U.S. at 375. The Court subsequently examined the common law status of actions to recover possession of realty, and concluded that the actions sounded in common law; *i.e.*, they were legal, not equitable. *Id.* at 375-82.

B.

Appellee emphasizes that the legal-equitable distinction is crucial in resolving this case. Because damages is a legal remedy, *see, e.g., Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 449 (1977); *Ross v. Bernhard*, 396 U.S. 531, 542-43 (1970), he concludes that the seventh amendment applies to this case and a jury trial is necessary. We are not persuaded by this argument. A plaintiff's demand for damages does not in itself convert his action into a suit at common law within the meaning of the amendment.

In *Galloway v. United States*, 319 U.S. 372, 388-89 (1943) (footnotes omitted), the Court stated:

> The suit is one to enforce a monetary claim against the United States. It hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the

> sovereign. Whatever force the Amendment has therefore is derived because Congress, in the legislation cited, has made it applicable.

This term, in *Lehman v. Nakshian*, —— U.S. ——, ——, 49 U.S.L.W. 4835, 4837 n.9 (June 26, 1981), the Court reaffirmed *Galloway* and explained:

> The reason that the Seventh Amendment presumption in favor of jury trials does not apply in actions at law against the United States is that the United States is immune from suit, and the Seventh Amendment right to a jury trial, therefore, never existed with respect to a suit against the United States. Since there is no generally applicable jury trial right that attaches when the United States consents to suit, the accepted principles of sovereign immunity require that a jury trial right be clearly provided in the legislation creating the cause of action.

Even the dissenting justices in *Lehman* accepted this reaffirmation of *Galloway*. *See id.* at 4839 n.2 (Brennan, J., dissenting). *See also Glidden Co. v. Zdanok*, 370 U.S. 530, 572 (1962) (plurality opinion); *United States v. Sherwood*, 312 U.S. 584, 587 (1941); *McElrath v. United States*, 102 U.S. 426, 440 (1880). Thus, the proper inquiry is not whether a plaintiff seeks money damages, but whether his action is in the nature of a legal remedy similar to a suit at common law. To answer this question we must examine the law relating to private actions against foreign sovereigns.

V.

The Supreme Court announced the doctrine of absolute jurisdictional immunity for foreign sovereigns in *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812), a polestar of both American and international law. American citizens attached a French

warship in Philadelphia, claiming she had been unlawfully seized from their custody by persons acting under orders of the Emperor Napoleon. The United States Attorney for the District of Pennsylvania appeared and filed a suggestion that the attachment be quashed and the libel dismissed, and the Attorney General argued the same position before the Supreme Court. Chief Justice Marshall's opinion for a unanimous Court examined principles of international law and concluded that "national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction." *Id.* at 145-46. The Court recognized that "the sovereign of the place is capable of destroying this implication," for example, by explicitly subjecting such vessels to the jurisdiction of its courts, but held that it must exert that power "in a manner not to be misunderstood." *Id.* at 146. The Court thereafter extended jurisdictional protection to commerical ships owned by foreign states in *Berizzi Brothers Co. v. S.S. Pesaro*, 271 U.S. 562 (1926), resting its decision on "the absolute independence of every sovereign authority, and . . . the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state." *Id.* at 575 (quoting *The Parlement Belge*, 5 P.D. 197, 217, [1874-80] All E.R. 104, ——, (C.A. 1880)).

The first crack in the wall of absolute immunity was not caused by Congress, but appeared in *Mexico v. Hoffman*, 324 U.S. 30 (1945). The Court noted the practice of the federal courts, followed since *The Schooner Exchange*, of recognizing claims of immunity registered by foreign governments and recognized "by the political branch of the government charged with the conduct of foreign affairs." *Id.* at 34. The guiding principle, said the Court, is that "the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs." *Id.* at 35. It concluded that "[i]t is . . . not for the courts

to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Id.* Because the State Department had explicitly declined to recognize Mexico's claim of immunity, the Court denied the claim, finding

> that it is the national policy not to extend the immunity in the manner now suggested, and that it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize.

Id. at 38.

The State Department in 1952 announced that in the consideration of requests from foreign governments it would adhere to the "restrictive theory of sovereign immunity," which recognizes immunity "with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." 26 Dept. State Bull. 984 (1952) (the "Tate letter").[4] The federal courts have expressed dissatisfaction with this distinction, but they have nevertheless uniformly followed it in the absence of an executive recognition of a specific claim of immunity. *E.g., Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). More important, the courts have continued to recognize claims certified by the State Department, without further inquiry. *E.g., Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974); *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir.) *cert. denied*, 404 U.S. 985 (1971); *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24 (4th Cir. 1961).

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4. The Tate letter is reprinted in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976), as an Appendix to the opinion of the Court.

History thus conclusively demonstrates that actions against foreign sovereigns have never existed at common law. The right of action has existed always and exclusively at the sufferance of the United States Department of State. For compelling reasons of national policy, our courts have from the earliest cases uniformly recognized and complied with the discretionary determinations of the executive branch. The law of liability of foreign sovereigns is, as the second circuit concluded, *sui generis*. *Ruggiero*, 639 F.2d at 881. We regard it as a unique species of public law, drawing deeply on its origins in admiralty and international law, peculiar only in its characteristic of absolute judicial fealty to executive decisionmaking.[5]

In 1973 and again in 1975 the Departments of State and Justice recommended to the Congress that it enact legislation codifying the restrictive theory and entrusting the resolution of questions of sovereign immunity to the judiciary. *See* H. R. Rep. No. 1487 at 6-7, 44-46, [1976] U.S. Code Cong. & Ad. News at 6604-06, 6634-35. Congress complied in 1976 by enacting the FSIA. We now consider the effect of codification on the common law status of these actions.

VI.

In enacting the Foreign Sovereign Immunities Act, Congress, upon the recommendation of the executive branch, transferred an important aspect of our foreign policy to the judiciary. *See id.*; *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 275 (3d Cir. 1980). In doing so, it expressed its intent that foreign sovereigns not be subjected to the jury system. This determination certainly does not reflect a distrust of the jury system by Congress. More probably it discloses a fear by Congress that for-

5. *Cf. Parsons v. Bedford*, 28 U.S. (3 Pet.) at 447 (describing admiralty as "a mixture of public law, and of maritime law and equity").

eign states, operating under the civil law tradition and not Anglo-American common law, and having little or no exposure to the jury system in civil cases, will question its wisdom and objectivity. *See Ruggiero*, 639 F.2d at 880 n.12; Aldisert, *The Nature of the Judicial Process: Revisited*, 49 Univ. of Cin. L. Rev. 1, 8-16 (1980). Significantly, Congress has refused to subject the United States to trial by jury, 28 U.S.C. §§1346(a)(2), 2402, and the Supreme Court has consistently upheld this refusal, *see, e.g., Lehman v. Nakshian*, —— U.S. ——, ——, 49 U.S.L.W. 4835, 4836-37 (June 26, 1981). The FSIA contains other instances in which Congress extended special procedures applicable to the United States to foreign states. *See* 28 U.S.C. §1608(d), (e); H.R. Rep. No. 1487 at 25-26, [1976] U.S. Code Cong. & Ad. News at 6624-25. To enhance the likelihood that foreign states will cooperate with the American judicial process, therefore, Congress limited the right to jury trial.

We are also persuaded that this qualification on the remedies available against foreign states was central to the congressional decision to create, for the first time, special federal jurisdiction over foreign states, and we do not doubt congressional authority to limit the jurisdiction of the federal courts to consider these claims. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868); *see also* J. Choper, Judicial Review and the National Political Process 380-415 (1980) (discussing "Political Regulation of Judicial Authority"). To hold that Congress could remove these cases from the federal judiciary, but could not effectuate a valid and legitimate foreign policy concern by taking the less radical step of limiting judicial access to nonjury proceedings would pose a Hobson's choice for Congress and ultimately work to the detriment of injured plaintiffs.

Therefore, we cannot conclude that by codification Congress has created a cause of action in the nature of a common law remedy. Congress explicitly determined,

upon the recommendation of the executive branch and for reasons of policy similar to those that have counselled past judicial deference to the executive, that no jury should intervene in an action under the FSIA. Inasmuch as the FSIA does not codify a pre-existing cause of action at common law, that determination does not offend the seventh amendment. *Compare Curtis v. Loether*, 415 U.S. at 195 (the seventh amendment applies to statutory rights of action "where there is obviously no functional justification for denying the jury trial right . . . [and] if the action involves rights and remedies of the sort typically enforced in an action at law").

We hold, therefore, that a suit against a foreign sovereign in district court pursuant to the FSIA is not a suit at common law within the meaning of the seventh amendment, and therefore that the denial of jury trial in the Act does not violate the Constitution.

VII.

Accordingly, consistent with the two other courts of appeals which have considered this specific issue, we will reverse the judgment of the district court granting appellee's motion for jury trial and remand the cause for further proceedings consistent with the foregoing.

SLOVITER, *Circuit Judge*, dissenting.

I agree with the majority's conclusion that when the Foreign Sovereign Immunities Act is fairly read, it must be construed as providing the sole basis of federal jurisdiction in actions against foreign states and their instrumentalities, as defined in the statute. Therefore, I agree that we cannot avoid the constitutional issue presented by the elimination of the right to jury trial in actions against corporations which are conducting the commercial enterprises of foreign states.

I dissent from the holding of the majority that a suit for damages against a corporation owned by a foreign state is not a suit "at common law" within the meaning of the Seventh Amendment. I believe that the majority deviates from the relevant precedent when it looks to the nature of the defendant rather than to the nature of plaintiff's claim or rights. Further, I believe that the right to jury trial preserved by the Seventh Amendment may not be extinguished by Congress' action in defining a "foreign state" to automatically include a corporation whose stock is owned by a foreign government. Accordingly, I would hold that the Foreign Sovereign Immunities Act is unconstitutional insofar as it denies plaintiff a jury trial merely because the defendant is a corporation in which a foreign state owns a controlling interest.

I.

Any analysis of the scope of the Seventh Amendment must begin with two guidelines enunciated by the Supreme Court in *Pernell v. Southall Realty*, 416 U.S. 363 (1974). The Court there focused on the Seventh Amendment's reference to suits "at common law" and stated that (1) "the right extends beyond the common-law forms of action recognized [in 1791]", *id.* at 374 (*quoting Curtis v. Loether*, 415 U.S. 189, 193 (1974)) and (2) "[the Seventh] Amendment requires trial by jury in actions unheard of at common law, provided that the

action involves *rights and remedies of the sort traditionally enforced in an action at law*, rather than in an action in equity or admiralty." *Id.* at 375 (emphasis added).

The majority's acknowledgement that the Seventh Amendment does not view common law as frozen in 1791 is mandated by the applicable precedent. *See Pernell v. Southall Realty*, 416 U.S. at 374-75; *Curtis v. Loether*, 415 U.S. at 193-95; *Ross v. Bernhard*, 396 U.S. 531, 533 (1970); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446-47 (1830); *In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069, 1078 (3d Cir. 1980). The relevant inquiry is whether the "rights and remedies" at issue are "of the sort" enforced at common law. Plaintiff in the present case is a United States citizen who seeks to recover tort damages for personal injuries he sustained as a longshoreman on a vessel owned by defendant while the ship was moored at a pier in Philadelphia. One cannot reasonably view the remedy sought as anything other than a traditional common law remedy. As the Court stated in *Curtis v. Loether*, 415 U.S. at 196, "the relief sought here — actual and punitive damages — is the traditional form of relief offered in the courts of law."

The majority has jumped, without fully articulating why, from the question of the nature of the legal remedy sought to the question of the amenability of foreign sovereigns to suit at common law. The majority appears to have reframed the relevant question into whether there was a "right" to sue a foreign sovereign at common law. Since the majority concludes from *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812), and its progeny that there was no such right, it follows for the majority that there is no Seventh Amendment protection for the suit in question. In its route to this conclusion, the majority leapfrogs over pertinent factual, legal and historical distinctions, which, for me, impair the logic of both its analysis and conclusion.

Central to the majority's focus on the nature of the defendant are the Supreme Court cases holding that suits against the United States, even when they are for monetary damages, do not require jury trials. *See Lehman v. Nakshian*, 49 U.S.L.W. 4835 (June 26, 1981); *Galloway v. United States*, 319 U.S. 372 (1943). The majority analogizes the sovereign immunity of the United States to the immunity accorded to foreign sovereigns, and reasons that if the Seventh Amendment does not compel jury trials in suits against the former, it follows that it does not compel jury trials in suits against the latter. Typescript op. at 13. The analogy is inapt.

The sovereign immunity of the United States has been attributed to a variety of constitutional, historical, and metaphysical principles. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 388 (1939). *Cf. Monaco v. Mississippi*, 292 U.S. 313, 321 (1934) (sovereign immunity implicit in constitutional plan); *Williams v. United States*, 289 U.S. 553, 573 (1933) (same); *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) ("[T]here can be no legal right as against the authority that makes the law on which the right depends.") It may inhere in the separation of powers under which we conduct our affairs. Whatever its theoretical basis, since the United States as sovereign cannot be sued in its own courts without its consent,[1] it follows that it may attach conditions to its consent to be sued, and that one of the conditions can be the elimination of trial by jury. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 572 (1962); *United States v. Sherwood*, 312 U.S. 584, 587 (1941).

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1. There has been an inexplicable failure to relate the constitutional provision that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . .", U.S. Const. Art. I, §9, cl. 7, to the doctrine of sovereign immunity. That provision, which conditions the United States' liability on its own consent, puts the sovereign immunity of the United States on a far different basis than either the sovereign immunity of the constituent states or of a foreign state.

In contrast, the sovereign immunity of foreign states has no constitutional underpinning. *National City Bank v. Republic of China*, 348 U.S. 356, 359 (1955); *Wacker v. Bisson*, 348 F.2d 602, 609 (5th Cir. 1965). Foreign sovereign immunity stems from notions of comity and expediency in the conduct of foreign affairs. *See First National Bank v. Banco Nacional City de Cuba*, 406 U.S. 759, 762 (1972) (plurality opinion).[2] The limits of the doctrine of foreign sovereign immunity were expressly noted by Justice Story in *The Santissima Trinidad & The St. Andre*, 20 U.S. (7 Wheat.) 283, 352-53 (1822):

> In the case of *The Exchange* (7 Cranch 116), the grounds of the exemption of public ships were fully discussed and expounded. It was there shown, that it was not founded upon any notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory; for that would be to give him sovereign power beyond the limits of his own empire. *But it stands upon principles of public comity* and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction. But as

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2. *Cf.* 14 W. Holdsworth, A History of English Law 59 (1964) (sovereign immunity deemed necessary "for the preservation of the honour and dignity of nations"); Reisenfield, *Sovereign Immunity of Foreign Vessels in Anglo-American Law: The Evolution of a Legal Doctrine*, 25 Minn. L. Rev. 1, 3 n.12 (1940) ("It is very difficult to give any more substantial rationalization for the doctrine of sovereign immunity than the reference to international comity. Stating that the exercise of jurisdiction in these cases would infringe upon the 'equality,' the 'independence,' or the 'honor' of the foreign state is hardly more than using a facon de parler.")

such consent and license is implied only from the general usage of nations. *it may be withdrawn upon notice, at any time, without just offence. and if afterwards such public ships come into our ports, they are amenable to our laws, in the same manner as other vessels.* (Emphasis supplied)

Therefore, I believe the majority errs in assuming that the immunity of foreign states rests on the same basis as that of the United States. Since the analogy itself is misconceived, it cannot persuasively justify elimination of jury trials when a foreign sovereign is sued.

II.

It is not now necessary for us to decide the extent of Seventh Amendment applicability when suit is against a foreign sovereign for official actions taken in its governmental capacity. No such issue is presented because the FSIA provides immunity from suit in such instances. 28 U.S.C. §1604. It is important, however, that we recognize that there has been a distinction historically observed between the foreign sovereign itself and its ownership interests.

Enterprises such as the defendant in the present case, a corporation wholly owned by the government of Peru, did not exist at the time the Seventh Amendment was adopted.[3] When foreign state-owned corporations began to be formed, they were not accorded presumptive immunity from suit. More often than not, such corporations were amenable to suit and in no case was ownership determinative. Indeed, it seems that courts have

3. *See* Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] W.L.R. 356, 366 (per Lord Denning); Compania Naviera Vascongado v. The Christina, [1938] A.C. 485, 521 (per Lord Maugham); Berizzi Bros. Co. v. S. S. Pesaro, 271 U.S. 562, 573 (1926); S. Sucharitkul, State Immunities and Trading Activities in International Law 19 (1950). *See also* Mexico v. Hoffman, 324 U.S. 30, 40-41 (1945) (Frankfurter, J., concurring).

uniformly declined to give decisive weight to the mere fact of ownership. In *Coale v. Societe Co-operative Suisse des Charbons*, 21 F.2d 180 (S.D.N.Y. 1921), the defendant was a Swiss corporation organized for the purpose of importing and distributing coal. The Swiss government appointed seven of the seventeen directors, reserved the right to approve the by-laws, and was entitled to all net profits above 6 per cent. Plaintiff sued for breach of a sales contract signed for the defendant by the Swiss Finance Minister. In dismissing defendant's claim of immunity, Judge Augustus Hand stated that "if the Swiss government chose to do its business by means of the Societe, the latter, as a corporate entity, was liable for its corporate obligations. I find no case which holds otherwise." *Id.* at 181.

Similarly, in *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929), the court rejected the defense of sovereign immunity where defendant was a corporation owned and controlled by France engaged in mining potash: "A suit against a corporation is not a suit against a government merely because it has been incorporated by direction of the government, and is used as a governmental agent, and its stock is owned solely by the government." *Id.* at 202. This same reasoning has led numerous other courts to reject claims of immunity interposed by corporate defendants. *See, e.g., Hannes v. Kingdom of Roumania Monopolies Institute*, 260 App. Div. 189, 198, 20 N.Y.S.2d 825, 833-34 (1940); *Ulen & Co. v. Bank Gospodarstwa Krajowego*, 261 App. Div. 1, 7, 24 N.Y.S.2d 201, 206 (1940); *The Uxmal*, 40 F.Supp. 258, 261 (D. Mass. 1941); *S. T. Tringali Co., Inc. v. The Tug Pemex XV*, 274 F.Supp. 227, 230 (S.D. Tex. 1967). *Cf. Mexico v. Hoffman*, 324 U.S. 30, 35 n.1., 36-37 (1945) (state ownership of merchant vessel does not, by itself, entitle vessel to immunity); *The Beaton Park*, 65 F.Supp. 211, 212-13 (D.D.C. 1946) (same).

Even where the court ultimately recognized a claim of immunity, recognition was not based upon state ownership alone. For example, in *In re Investigation of World Arrangements*, 13 F.R.D. 280, 290 (D.D.C. 1952), the court, although holding that the Anglo-Iranian Oil Company was immune, stated that "in determining whether or not a given corporation is an instrumentality of its government it is not material whether the government owns all the stock." The court defined the real question as "whether the corporate entity . . . is of such a character as to be recognized as a unit of the . . . Government." *Id.* No case cited by appellant or the United States, which has intervened, undercuts or seriously challenges the line of authority set out above.[4] Thus the relevant case law demonstrates that corporations such

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4. Mason v. Intercolonial Railway of Canada, 197 Mass. 349, 83 N.E. 876 (1908); Bradford v. Director General of Railroads of Mexico, 278 S.W. 251 (Tex. Civ. App. 1925); Dunlap v. Banco Central del Ecuador, 41 N.Y.S.2d 650 (1943); United States of Mexico v. Schmuck, 293 N.Y. 264, 56 N.E.2d 577 (1944); and Stone Engineering Co. v. Petroleos Mexicanos, 352 Pa. 12, 42 A.2d 57 (1945), are cited by the United States for the proposition that corporate entities were on occasion entitled to immunity. Brief for the United States at 31 n.15. I find most of these cases inapposite. A central factor to the holding in *Mason* was the fact that the railway was *not* a corporation and that no corporation had any interest in the railway. In *Bradford*, the court relied upon testimony that the railroad was not operated as a corporation, that all persons having any relationship to the operation of the railroad were "solely, exclusively and entirely employees of the Government of Mexico, and have no relation or connection with any corporate entity." 278 S.W. at 251-52. Likewise, in *Schmuck*, the Mexican Charge d'Affaires specifically called to the attention of the Secretary of State the fact that defendant was not a corporate entity. 56 N.E.2d at 578. The two cases which are on point, *Dunlap* and *Stone Engineering Co.*, do no more than restate the accepted distinction between public or governmental functions and private or commercial undertakings. The uncontroverted proposition remains that mere state ownership did not entitle foreign corporations to the immunity granted the state itself.

as the defendant in this case were subject to suit prior to the FSIA. The majority's reliance on the immunity from suit of the foreign state itself is not to the contrary but is, rather, simply irrelevant.

Another reason to reject the majority's automatic identification of the foreign state with commercial corporations in which the foreign state has an interest is the distinction observed at common law between the United States and the commercial corporations in which it had an interest. There is a consistent line of authority in the Supreme Court, the lower federal courts, and state courts holding that the attributes of sovereignty, including immunity, are not conferred upon a corporation by the mere fact of governmental ownership. *See, e.g., Bank of the United States v. Planters' Bank of Georgia*, 22 U.S. (9 Wheat) 904, 906 (1824); *United States v. Strang*, 254 U.S. 491, 493 (1921); *Sloan Shipyards Corp. v. United States Fleet Corp.*, 258 U.S. 549, 565 (1922); *Olson v. United States Spruce Production Corp.*, 267 U.S. 462, 463 (1925); *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 388 (1939); *Federal Sugar Refining Co. v. United States Sugar Equalization Board, Inc.*, 268 F. 575, 585 (S.D.N.Y. 1920); *Panama R. Co. v. Minnix*, 282 F. 47, 49, 50 (5th Cir. 1922); *Cox v. Lykes Brothers*, 237 N.Y. 376, 382-83, 143 N.E. 226, 228 (1924).[5] *See also* Thurston, *Government Propri-*

5. Even where property was held directly by the sovereign and not through the intermediary of a corporation, such property was not given immunity by virtue of ownership alone. *See* The Davis, 77 U.S. (10 Wall.) 15 (1869) (salvage lien enforceable against property of U.S. since not in actual possession of government); The Fidelity, 8 Fed. Cas. (16 Blatchf.) 1189, 1191 (C.C.N.Y. 1879) ("Property does not necessarily become part of the sovereignty because it is owned by the sovereign. To make it so, it must be devoted to public use, and employed in carrying on the operations of government"); Berizzi Bros. Co. v. Pesaro, 271 U.S. at 575 (*quoting* Briggs v. The Light Boats, 11 Allen 157, 165 (Mass. 1865) ("Immunity . . . arises . . . because [the boats] are instruments of sovereignty . . . [and because of] the purpose to which they are devoted").

etary Corporations, 21 Va. L. Rev. 351, 372, 377 n.67 (collecting cases), 379 n.73 (collecting cases) (1935). As Chief Justice Marshall explained,

> The suit is against the corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the individual incorporators. The state does not, by becoming a corporator [sic], identify itself with the corporation.

Bank of the United States v. Planters' Bank of Georgia, 22 U.S. at 906. He continued,

> The governnment of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the Bank.

Id. at 908.

The thread running through these cases, as with those dealing with foreign state-owned corporations, is that ownership itself raises no presumption of immunity. It followed that when plaintiffs could sue such defendants, they were accorded jury trials despite the sovereign character of the owner of the defendant corporation.[6] *Legette v. National Railroad Passenger Corp.*, 478 F.Supp. 1069 (E.D.Pa. 1979) (U.S); *Washington v. National Railroad Passenger Corp.*, 477 F.Supp. 1134 (D.D.C. 1979) (U.S.); *see also MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971) (Canada).

Until enactment of the FSIA, the critical factor in determining whether a claim of sovereign immunity was appropriate was not mere ownership but was instead the nature of the foreign sovereign's action or activity at is-

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6. Actions against United States corporations were not treated as actions against the United States which would have been cognizable only in the Court of Claims, but instead were held to be properly brought in the district courts. Sloan Shipyards Corp. v. United States Fleet Corp., 258 U.S. 549 (1922).

sue. Immunity was accorded for official actions of foreign sovereigns and denied for their commercial or proprietary activities. *See Victory Transport Inc. v. Comisaria General*, 336 F.2d 354, 360-62 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). That distinction was maintained in the 1952 "Tate Letter" which formalized the State Department's adherence to the "restrictive theory" of foreign sovereign immunity. While it is of course true that immunity was extended to a merchant vessel in *Berizzi Bros. Co. v. Pesaro*, 271 U.S. 562 (1926), that decision was reached in the face of the State Department's position that the "merchant vessels or vessels under requisition of governments whose flag they fly employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war." *See Mexico v. Hoffman*, 324 U.S. at 39 (Frankfurter, J., concurring); 2 G. Hackworth, *Digest of International Law* 437, 444-45 (1941). The Court rested its decision on an expansive notion of what constituted sovereign acts and "public property". It may be that in the late 19th and early 20th century, when the vision of the commercial empire flourished, a court could conclude that an armed commercial fleet[7] was a necessary arm of sovereignty and so extend to it the immunity normally reserved to the state itself. It is ironic that such an outdated and discredited notion[8] should be resurrected by the majority as the basis for extinguishing the "fundamental and sacred" right to trial by jury. *See Jacobs v. New York City*, 315 U.S. 752, 752 (1942).

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7. The merchant vessel which was the subject of the *Berizzi* opinion was armed. *See* 2 G. Hackworth, Digest of International Law 437 (1941).

8. The wisdom of the *Berizzi* decision was questioned by Justice Frankfurther in his concurring opinion in Mexico v. Hoffman, 324 U.S. 30, 39, 40-41 (1945). More recently, four members of the Court agreed that the "authority of that case [*Berizzi*] has been severely diminished by later cases," Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 699 (1976), and that "*Berizzi* no longer correctly states the law." *Id.* at 703.

III.

To recapitulate, I believe the majority's analysis is flawed because it erroneously equates foreign and domestic sovereignty and fails to differentiate between the official and the commercial actions of the foreign sovereign.[9] I turn then to the majority's reliance on the presumption of constitutionality for legislative acts and the "importance of the congressional decisions reflected in the FSIA of the nation's foreign policy" as additional support for its conclusion that the Seventh Amendment is inapplicable to legal claims against corporations which happen to be owned in whole or in part by foreign states. *See* Typescript op. at 9-10. Congress has *not* made a policy determination that suits against foreign sovereign-owned instrumentalities engaged in commercial activities are inimical to our foreign policy interests. Quite the contrary. In the FSIA, Congress has expressly provided that commercial activities of foreign states are *not* immune from suit in the federal courts. The only issue is whether Congress had the power to deprive plaintiffs in such actions of their right to jury trials.

As to the presumption of constitutionality, I believe that any federal judge who determines, after independent analysis, that Congress has acted beyond the scope of its powers does so reluctantly. Nonetheless, the responsibility of the judiciary to determine when Congress has exceeded the permissible scope of its powers occupies too central a place in the success of our system of

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9. I do not suggest that the distinction between an official activity and a commercial activity of a foreign state is always clear. It is, however, a line which the FSIA has already drawn, since it defines "commercial activity" to mean "either a regular course of commercial conduct or a particular commercial transaction or act." The act further provides that "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. §1603(d).

government to be avoided under the rubric of the presumption of validity of legislative actions. Unquestionably, Congress could, if it chose, limit the jurisdiction of the federal courts by excluding therefrom not only suits against foreign sovereigns for their official actions but also suits against foreign sovereign-owned instrumentalities engaged in commercial activities. But having chosen not to do so, the congressional power to control the jurisdiction of the federal courts may not be used as a justification for congressional action which denies substantive constitutional rights. *See United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872); *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir. 1948), *cert. denied*, 335 U.S. 887 (1948).

I, too, believe that, where possible, courts should defer to the wisdom of Congress when, acting on the advice of the executive, it enacts legislation dealing with foreign affairs. However, I am unwilling to accept the majority's relegation of the judiciary's role to one of "absolute judicial fealty to executive decisionmaking." Typescript op. at 15. All exercises of governmental power must be tested against the constraints imposed by the Constitution. The area of foreign affairs, however delicate, is no exception:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written constitution and undermine the basis of our Government. If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes.

Reid v. Covert, 354 U.S. 1. 14 (1957). *See also Geisser v. United States*, 513 F.2d 862 (5th Cir. 1975), *on remand Petition of Geisser*, 414 F. Supp. 49 (S.D. Fla. 1976), *vacated, Geisser v. United States*, 627 F.2d 745 (5th Cir. 1980) (en banc), *cert. denied, Bauer v. United States*, 101 S.Ct. 1741 (1981).

The constitutional issue arises in this case because Congress, in the FSIA, did more than meet what the legislative history shows were its primary concerns: to vest sovereign immunity decisions exclusively in the courts[10] and "to assure that American citizens are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions".[11] When Congress defined "foreign states" to include foreign sovereign-owned corporations engaged in commercial activities, it extended the scope of the statute beyond foreign policy considerations and collided with the fundamental interest in providing jury trials in civil cases. A growing number of foreign states have systems of government which extend state ownership to all forms of business enterprises, including airlines, steel companies, banks, and, as in this case, commercial ships. The statute as construed by the majority would deprive plaintiffs of their jury trials in a vast number of ordinary tort and contract actions against such entities. Such actions involve "rights and remedies of the sort traditionally enforced in an action at law." *Pernell v. Southall Realty*, 416 U.S. at 375. Whether Congress chose to call the defending enti-

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10. H. R. Rep. No. 94-1487, 94th Cong., 2d Sess. 12, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6610; Hearings Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, on H. R. 11315, 94th Cong., 2d Sess. 25 (June 2, 1976) (Testimony of Monroe Leigh, Legal Adviser, Department of State) [hereinafter Hearings].

11. Hearings, *supra*, Note 10 at 24 (Testimony of Monroe Leigh).

ties "foreign states," "agencies or instrumentalities of foreign states," or "camels" cannot be determinative of plaintiff's Seventh Amendment right to jury trial. Where constitutional rights are at stake, the judiciary cannot play Polonius to Congress' Hamlet and so permit legislative lexicography to defeat those rights.[12]

IV.

In summary, the right to jury trial in civil actions protected by the Seventh Amendment is a fundamental right which inures to federal plaintiffs when the rights and remedies they seek to enforce are of the sort traditionally enforced in an action at law. Actions for damages against corporations engaged in commercial activities which are owned in whole or in part by foreign sovereigns fall within that category. Neither the historic immunity accorded to foreign states nor the faulty analogy to the sovereign immunity of the United States can justify deprivation of a jury trial in cases against such corporations. To the extent that the FSIA deprives plaintiffs seeking damages of a jury trial in their actions against foreign sovereign-owned corporations, I believe it is unconstitutional. I also believe that provision for a nonjury trial in such cases can be severed from the re-

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12. HAMLET: Do you see yonder cloud that's almost in shape of a camel?

POLONIUS: By th' mass and 'tis, like a camel indeed.

HAMLET: Methinks it is like a weasel.

POLONIUS: It is backed like a weasel.

HAMLET: Or like a whale.

POLONIUS: Very like a whale.

Wm. Shakespeare, Hamlet, Prince of Denmark, Act III, ii (Peng. ed. 1969).

mainder of the FSIA, and would therefore affirm the order of the district court refusing to strike the demand for jury trial.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NOS. 80-2335/80-2336

REX, Calvin

vs.

Cia. Pervana de Vapores,S.A.

CALVIN REX and CIA.
PERVANA DE VAPORES,S.A.,
Appellants in No.80-2335

UNITED STATES OF AMERICA,
Intervenor,
Appellant in No. 80-2336

(D.C. Civil No. 78-3694)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: Aldisert, Weis and
Sloviter, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on June 8, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed July 23, 1980, be, and the same is hereby reversed and the cause remanded for further proceedings consistent with the opinion of this Court. Costs taxed against appellee.

ATTEST:

/s/ Sally Mrvos
Clerk

September 17, 1981

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NOS. 80-2335/6

REX, CALVIN

v.

CIA. PERVANA de VAPORES,S.A.

Calvin Rex, et al.,
Appellants in No. 80-2335

United States of America,
Intervenor
Appellant in No. 80-2336

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and
ALDISERT, ADAMS, GIBBONS,
HUNTER, WEIS, GARTH,
HIGGINBOTHAM and SLOVITER,
Circuit Judges.

The petition for rehearing filed by

APPELLEE, CALVIN REX

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having

asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Gibbons and Sloviter would grant the petition for rehearing.

By the Court,

/s/ Joseph F. Weis, Jr.
Judge

Dated: October 22, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CALVIN REX : CIVIL ACTION

v. :

CIA. PERVANA DE VAPORES, S.A. : NO.78-3694

MEMORANDUM

CAHN, J. June 24, 1980

I. FACTS

Plaintiff is a longshoreman. On August 14, 1978, plaintiff was employed by Northern Shipping Co. (a stevedore) and was engaged in discharging cargo from the M/V Chocano. M/V Chocano is a merchant vessel owned and operated by the defendant, Cia. Pervana De Vapores,S.A. During the course of his work, plaintiff was injured. Alleging that his injuries were caused by the negligence of defendant, plaintiff instituted the instant action for damages pursuant to § 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b). Plaintiff's complaint contained a demand for a jury trial. Jurisdiction over plaintiff's action in this court was allegedly based on 28 U.S.C. § 1332, commonly called

diversity jurisdiction. In brief and argument plaintiff's counsel also asserted jurisdiction under 28 U.S.C. §§ 1330 and 1331.

M/V Chocano is an ocean-going vessel engaged in foreign commerce and is registered in Peru. Defendant is a Peruvian corporation all of whose stock is owned by the sovereign State of Peru. Defendant alleges that, as an "agen[t] or instrumentality of a foreign state" as defined in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602, 1603(b)(2), jurisdiction in this court may only be based on 28 U.S.C. § 1330(a). Since jurisdiction under 28 U.S.C. § 1330(a) is limited to "nonjury" civil actions, defendant has made a motion to strike plaintiff's demand for a jury trial. That motion, and the question of statutory interpretation which it presents, is the issue before the court.

II. BACKGROUND

As a doctrine of international law, foreign sovereigns have enjoyed a limited immunity from suit in United States

courts. Courts have traditionally deferred to the practice and policies of the State Department of the federal government in deciding on the application of the immunity doctrine to a foreign sovereign. See Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976); Mexico v. Hoffman, 324 U.S. 30, 65 S.Ct. 530, 89 L.Ed. 1014 (1945); H.R. Rep. No.94-1487, U.S. Code Cong. & Admin. News 1976, p. 6604, 122 Cong. Rec. 6604 (1976) (hereinafter House Report). This system presented various practical problems in modern times, and after years of deliberation and consultation with the State Department, the Office of Foreign Litigation of the Justice Department, and the private bar, Congress formulated a comprehensive new approach to procedural issues involving suits against a foreign sovereign. The result was the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602, et seq. (hereinafter the FSIA).

The main purpose of the FSIA was to confer on the United States District Courts the authority to determine when

the doctrine of sovereign immunity is to be invoked to bar an action against a foreign sovereign and to provide standards for that determination. See 28 U.S.C. § 1602; House Report. In addition the FSIA sought to provide comprehensive guidelines for attachments, service of process, jurisdiction, and other procedural problems related to suits against foreign sovereigns. In doing so the FSIA amended and added to the sections of Title 28, Chapter 95 of the United States Code which set forth the jurisdiction of the United States District Courts. Therein lies the crux of the present problem.

A. STATUTORY CHANGES UNDER THE FSIA

Prior to the FSIA, 28 U.S.C. § 1332(a) read:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between--
>
> (1) citizens of different States;
>
> (2) citizens of a State,

and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties;

The FSIA amended § 1332 as follows:

SEC. 3 That section 1332 of title 28, United States Code, is amended by striking subsections (a)(2) and (3) and substituting in their place the following:

'(2) citizens of a State and citizens or subjects of a foreign state;

'(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

'(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or different States.'

In addition the FSIA inserted the following new section into Chapter 95 of Title 28:

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction with-

out regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

The rest of the FSIA was inserted into Title 28 as a new chapter, Chapter 97, entitled "Jurisdictional Immunities of Foreign States." Section 1603 of the new chapter provided:

§ 1603. Definitions

For purposes of this chapter--

(a) A 'foreign state', except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An 'agency or instrumentality of a foreign state' means any entity--

(1) which is a separate legal person, corporation or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority

> of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

III. POSITIONS OF THE PARTIES

Defendant's position is that the FSIA comprehensively codified those instances in which jurisdiction over a foreign sovereign could be maintained in the federal courts. According to defendant, the FSIA was the result of years of intense effort, and its content should not be viewed as a product of hasty legislative work. Defendant points out that the FSIA accomplished three things simultaneously: first, it eliminated from 28 U.S.C. §1332 district court jurisdiction over civil suits to be tried by a jury between a citizen and a foreign state as a defendant; second, it created district court jurisdiction over nonjury civil suits between a citizen and a foreign state as a defendant in new section 28

U.S.C. § 1330; third, it included in the definition of a foreign state a corporation like the defendant which is controlled by the former statute and otherwise meets the tests of 28 U.S.C. § 1603(b). Defendant argues that the FSIA unequivocally took away from this court jurisdiction over a jury trial in the instant case, and that this court has jurisdiction based on § 1330 only if the demand for a jury trial is stricken from the complaint.

To reinforce its position, defendant points to the legislative history of the FSIA. In H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., reprinted in [1976] U. S. CODE CONG. & AD. NEWS 6604 (hereinafter House Report), which accompanied the Foreign Sovereign Immunities FSIA to both the House and Senate floors and represented years of committee work, it was stated:

> The purpose of the proposed legislation, as amended, is to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States ....

....

SEC. 2. JURISDICTION IN ACTIONS AGAINST FOREIGN STATES

Section 2 of the bill adds a new section 1330 to title 28 of the United States Code, and provides for subject matter and personal jurisdiction of U. S. district courts over foreign states and their political subdivisions, agencies and instrumentalities. Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states.

....

As in suits against the U. S. Government, jury trials are excluded. See 28 U.S.C. 2402.

....

SEC. 3. DIVERSITY JURISDICTION AS TO FOREIGN STATES

Section 3 of the bill amends those provisions of 28 U.S.C. 1332 which relate to diversity jurisdiction of U.S. District courts over foreign states. Since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous. The amendment deletes references to 'foreign states' now found in paragraphs (2) and (3) of 28 U.S.C. 1332(a), and adds a new paragraph

> (4) to provide for diversity jurisdiction in actions brought by a foreign state as plaintiff. These changes would not affect the applicability of section 1332 to entities that are both owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332(c) and (d). See anaylsis to section 1603(b).

Defendant argues that this court cannot ignore the clear intent of Congress given Congress' constitutional power to establish the jurisdiction of the federal district court under Article III of the United States Constitution and Congress' power to control the relations of the United States with foreign states under Article I, Section 8, of the United States Constitution.

Plaintiff argues that defendant's construction of the statute is erroneous, and second that such an interpretation would place the statute in violation of the Seventh Amendment to the Constitution which preserves the right to a jury trial as known at common law.

Plaintiff's position is that, even though Congress may grant or deny

jurisdiction in this case to the district court, if Congress grants that jurisdiction it cannot be done in an unconstitutional manner. Therefore plaintiff argues that I must either declare the statute unconstitutional because it violates the Seventh Amendment or in the alternative construe the statute as granting a jury trial so as to avoid the constitutional issue.

Plaintiff urges that such jurisdiction can be based on 28 U.S.C. § 1332 (diversity jurisdiction) or §1331 (federal question jurisdiction). In addition, plaintiff suggests that 28 U.S.C. §1330 can be interpreted to eliminate a jury trial only from that aspect of the case involving a determination of the application of sovereign immunity.

IV. A SERIOUS CONSTITUTIONAL ISSUE IS PRESENTED IF THE FSIA IS INTERPRETED TO DENY PLAINTIFF A RIGHT TO A JURY TRIAL IN THE INSTANT CASE.

A. THE SEVENTH AMENDMENT

The Seventh Amendment provides that

"[i]n suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of jury trial shall be preserved..." The guidelines to interpreting this Amendment were set forth in Curtis v. Loether, 415 U.S. 189 (1974). In that case the court held that the Seventh Amendment of the Constitution entitled either party to demand a jury trial in an action for damages based on a section of the Civil Rights Act of 1968, which authorized private plaintiffs to bring civil actions to redress violations of that Act's fair housing provisions. The Court stated:

> Although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time. Mr. Justice Story established the basic principle in 1830:
>
> > 'The phrase "common law," found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence.... By common law, [the Framers of the Amendment] meant ... not merely suits, which the common

> 'law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.... In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.' Parsons v. Bedford, 3 Pet. 433, 446-447 (1830) (emphasis in original).

Curtis v. Loether, 415 U.S. 189, 193 (1974).

> [W]hen Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.

415 U.S. 189, 195 (1974).

> A damages action under the statute sounds basically in tort--the statute merely definies a new legal duty, and authorizes the courts to compensate a plaintiff for the

> injury caused by the defendant's wrongful breach. As the Court of Appeals noted, this cause of action is analogous to a number of tort actions recognized at law. More important, the relief sought here--actual and punitive damages--is the traditional form of relief offered in the courts of law.

415 U.S. 189, 195-96 (1974) (footnotes omitted). Therefore the Court ruled that there was a right to jury trial under the statute guaranteed by the Seventh Amendment.

In Pernell v. Southall Realty, 416 U.S. 363 (1974), the Court considered whether the Seventh Amendment required the interpretation of a District of Columbia statute to allow a jury trial. The Court said:

> Whether or not a close equivalent to § 16-1501 existed in England in 1791 is irrelevant for Seventh Amendment purposes, for that Amendment requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty. See Curtis v.Loether, supra, 195.

416 U.S. 363, 375 (1974).[1]

The Supreme Court's guidelines are quite clear--I must look to the nature of the action before me to determine if the right to a jury trial is guaranteed by the Seventh Amendment.[2]

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[1]The Court has distinguished cases where a government agency enforces a public right. That is not the situation presented by this case. See Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977).

[2]The Seventh Amendment states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

B. THE NATURE OF AN ACTION UNDER SECTION 5(b) OF THE LONGSHOREMAN'S AND HARBOR WORKER'S COMPENSATION ACT

In 1972 Congress amended the Longshoreman's and Harbor Worker's Compensation Act of 1927 (LHWCA), 33 U.S.C. §901-50, fundamentally changing the basis for a longshoreman's action against a vessel owner. Under the amended statute a vessel owner would no longer be strictly liable for a longshoreman's injuries incurred while working on its ship under theories of unseaworthiness, nondelegable duty, or for a stevedore's negligence under a theory of respondeat superior. Additionally an owner would no longer have an action against a stevedore for indemnification. Instead, an owner would be liable to an injured longshoreman only for its own negligence which proximately caused the injury. Rich v. U.S. Lines, 596 F.2d 541, 545 (3d. Cor. 1979); McCarthy v. Silver Bulk Shipping, Ltd., 487 F.Supp. 1021 at 1024 (E.D.Pa. 1980). As Chief Judge Lord has opined, "[i]n short, under the Act as amended, a longshoreman can bring

suit against a vessel owner and only for the owner's negligence." McCarthy v. Silver Bulk Shipping, Ltd., supra, at 1024. The LHWCA imposes the same duty to use reasonable care that would be applicable to a land-based business, Griffith v. Wheeling-Pittsburgh Steel Corp., 610 F.2d 116, 125 (3d Cir. 1979), and where appropriate the trial court is instructed to look to the Restatement (Second) of Torts for guidance in applying the LHWCA. Rich v. U.S. Lines Inc.596 F.2d 541 (3d Cir. 1979); Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir.), cert. denied, 434 U.S. 861 (1977).

In effect the action in the instant case is in the form of a traditional tort action at law.[3] If the FSIA clearly

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[3]The nature of the substantive basis of the action under §905(b) should not be confused with the fact that the constitutional basis of the LHWCA is the admiralty jurisdiction in Article III of the Constitution. See Hurst v. Triad Shipping Co., 554 F.2d 137 (3d Cir. 1977).

deprive plaintiff of a jury trial it would appear that I would be required to declare it unconstitutional.

Defendant, and the United States as intervenor,[4] argue that there is no difficult question presented under the Seventh Amendment. They argue that at common law no action against a sovereign existed, and that when a sovereign consents to be sued the sovereign may do so in a nonjury form. As the Court of Appeals for the Third Circuit has stated:

> (1) 'The Government cannot be sued, except with its own consent. It

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[4]Since plaintiff raised the issue of the constitutionality of the Foreign Sovereign Immunities Act as defendant asked us to construe it, the United States was notified pursuant to 28 U.S.C. § 2403(a), and the United States exercised its right to intervene thereunder. I was informed by the Department of Justice that they had not been given notice or opportunity to intervene in any case prior to this one involving the questions here at issue. See Brief of Intervenor United States at 26, n.11.

'can declare in what court it may be sued, and prescribe the forms of pleadings and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States. *** If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the Government to the exercise of the privilege. Nothing more need be said on this subject.' McElrath v. United States, 102 U.S. 426, 440, 26 L.Ed. 189 (1880). (emphasis supplied)

(2) The grant of jurisdiction by the sovereign is in aid of determining the method of trial in the absence of an express provision. United States v. Pfitsch, 256 U.S. 547, 41 S.Ct. 569, 65 L.Ed. 1084 (1921); 5 Moore, Federal Practice ¶38.31(2) at 234 (2d ed. 1964).

Collins v. Government of Virgin Islands, 366 F.2d 279 (3d Cir. 1966), cert. denied, 386 U.S. 958 (1967) (emphasis in original). Defendant argues under these principles, as in suits against the United States under the Tucker Act or Federal Tort Claims Act, a jury trial is not a matter of right in a case against a sovereign. See Glidden v. Zdanok, 370 U.S. 530, 82 S.Ct. 1459, 8 L.Ed.2d 671.

However, in the instant case no sovereign has consented to any suit. Instead, the Congress of the United States has adopted the so called "restrictive theory" of sovereign immunity as a principle of International Law. See Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1975); House Report. The FSIA directs me not to determine if Peru has consented to suit in this case, but impels me to hold that no sovereign immunity exists in the instant case.[5] Thus, I proceed in this action

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[5]It might be possible to develop a theory which could apply the concepts of Collins v. Government of Virgin Islands, supra, to the instant case. One could argue that foreign governments and corporations controlled by them are only subject to suit in the United States by consent. By entering the territory of the United States, these governmental entities constructively consent to suit under the FSIA, and they do so only in the non-jury forum provided for in the FSIA.

This theory would be deficient in at least two respects. First, such a theory is contrary to the restrictive

(footnote continued)

not on the assumption that sovereign immunity has been waived, but that it does not exist. Congress has granted a substantive right to sue a foreign sovereign in this case, which it admittedly could have denied. See Alfred Dunhill v. Cuba, supra. However, once Congress grants that right, combining the LHWCA and the FSIA, to sue this defendant in a negligence action, Congress cannot grant that right in violation of the Seventh Amendment.

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theory of sovereign immunity which has been the law in this country for over fifty years and is embodied in the FSIA. See House Report. Under that restrictive theory there is no need for the consent of foreign governmental entities to subject them to suits arising from their commercial activities. Additionally, given the ambiguities in the statute noted later in this opinion, it cannot be said that constructive consent would only be to a nonjury trial while 28 U.S.C. §§1331, 1332 and other statutes noted below remain the law of the United States. As long as the statute remains ambiguous on the matter of jury trials, it cannot be said that constructive consent to suit is unambiguously given only for a nonjury forum.

See Icenogle v. Olympic Airways, 82 F.R.D. 36, 40 and citations therein (D.D.C. 1979).

Though I do not dismiss defendant's argument, I do not think it has the clear applicability defendant believes. I hold that the instant case presents a sufficiently difficult constitutional issue to invoke the long-established doctrine that a court should construe a statute, if possible, so as to avoid a constitutional issue.[6]

> It is,of course, a '"cardinal principle that this Court will

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[6]Even if it were held that Congress can deprive the right to a jury trial because a sovereign would have been immune to suit at common law in 1791, there is still a difficult constitutional question. This defendant is not a traditional foreign sovereign. It is only a foreign sovereign by effect of the FSIA. There is a dearth of cases prior to 1791 defining the status of commercial corporations a majority of whose stock is owned by a foreign government. Such creatures were rare at that time. Even if the treatment of foreign sovereign governments was clear at common law, the treatment of this corporate hybrid was not.

> first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.'" United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971).

Pernell v. Southall Realty, 416 U.S. 363, 365 (1974).

Therefore, I must turn to the question of whether there is any statutory basis for jurisdiction over a jury trial in this case.[7]

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[7] I note that the doctrine of avoiding a constitutional question has disturbing implications here. I am engaged in interpreting the jurisdiction granted to my court by Congress under Article III of the Constitution. The power to establish the jurisdiction of this court is specifically given to Congress in the Constitution. It may be that in avoiding a constitutional issue under the Seventh Amendment I engage in creating a constitutional issue under Article III. Surely, if Congress had unequivocally stated that this court has no jurisdiction over a jury trial in this case, I could not create my own jurisdiction just to avoid a constitutional issue. It could be argued, therefore, that I should not invoke the avoidance doctrine.

(footnote continued)

V. JURISDICTION OVER THE INSTANT CASE EXISTS UNDER 28 U.S.C. § 1332

Defendant argues that we should not torture by construction the words of the FSIA which was the product of long and careful deliberation, as we might to deal with inconsistencies in hastily drawn legislation. This very argument works against the defendant. If Congress so

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However, every Congressional enactment must stem from some power granted Congress under the Constitution. All powers not granted the federal government are reserved to the states. Every time the doctrine of avoidance is invoked in interpretation of a statute, there are issues raised regarding the separation of powers, that the court involves itself in "legislating" contrary to Congress' intent, in a field where the power to legislate is specifically given to Congress in the Constitution. If this was enough of a countervailing consideration to stop courts from avoiding constitutional issues in interpreting a statute, there could be no such doctrine. Such countervailing problems must arise in every case where the doctrine is invoked.

clearly intended to eliminate the jury trial in the instant case, then I find it hard to understand why glaring ambiguities were left on the face of the statute as enacted.

The FSIA created a new chapter of Title 28 and amended sections of an existing chapter of the United States Code. First, the FSIA stated that "chapter 85 ... is amended by inserting" §1330. Then the FSIA amended §1332 to remove jurisdiction between a citizen of a state and a foreign state, but specifically retained jurisdiction in that section over suits between "citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. §1332(a)(2). Then the FSIA stated that "title 28 ... is amended by inserting after chapter 95 the following new chapter," which was Chapter 97. It is in Chapter 97 that the definition of a "foreign state" is found, and it is specifically limited to that chapter. See p.3, infra. Therefore, a "separate legal person," corporate or otherwise, whose controlling shares may be owned by

a foreign state is not expressly precluded by the statute from being a citizen or subject of a foreign state for purposes of 28 U.S.C. §1332. If such an exclusion is read into the statute, it must be implied, for it does not appear on the face of the statute. I choose not to make such an implication when to do so would deprive plaintiff of a jury trial. I agree with the other judges who have found jurisdiction under §1332 in cases such as the instant action.[8]

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[8]Three judges previously addressing the issue have held that jurisdiction over a jury trial in cases such as the instant case can be predicated upon 28 U.S.C. §1332. Houston v. Murmansk Shipping Co. No. K-78-1373 (D.Md. May 23, 1980); Lonon v. Companhia De Navegacao Lloyd Basileiro, 85 F.R.D. 71 (E.D. Pa. 1979); Icenogle v. Olympic Airways, S.A., 82 F.R.D. 36 (D.D.C. 1979). Two cases brought to my attention seem to hold that a jury trial is not provided for in cases such as the instant case. However, in those cases jurisdiction was only alleged on 28 U.S.C. §1330, and the issue was not central to the case. Outboard Marine Corp. v. Pezetel, 461 F.Supp. 384, 396 (D. Del 1978); East Europe International Sales Corp. v. Terra, 467 F.Supp. 383 (S.D.N.Y.

(footnote continued)

March 28, 1978). One judge has held that depriving the right to a jury trial against foreign sovereigns which are removed to the district court under 28 U.S.C. §1441 (d) is not unconstitutional. Williams v. The Shipping Corporation of India, 489 F.Supp. 526 (E.D. Va. 1980). Another judge has ruled that no right to a jury trial exists without consideration of any constitutional issues. Cululu v. M/V Odessa, No. 78-3344 (E.D. La. April 28, 1980).

Our interpretation of 28 U.S.C. §1332 creates an inconsistency with the provision allowing removal to federal district court of suits against a foreign sovereign brought in state court. Section 1441(d) of Title 28 of the United States Code provides that a defendant foreign state may remove a case to a federal court where "the action shall be tried by the court without a jury..." Section 1441(d) specifically incorporates the definition of a foreign state set forth in §1603(a) of the FSIA.

The constitutional issue may have to be directly faced in a removal case. See Williams v. The Shipping Corporation of India, 489 F.Supp. 526 (E. D. Va. 1980). Also, the constitutional issue may possibly be faced in a suit directly against a foreign government that cannot be construed as being a "citizen or subject of a foreign state" within 28 U.S.C. §1332 and does not come within any

(Footnote continued)

VI. JURISDICTION OVER THE INSTANT ACTION IS GRANTED BY 28 U.S.C. §1331

Section 1331(a) of Title 28 of the United States Code provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

An action arises under the laws of the United States if the complaint seeks a remedy expressly granted by federal

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other jurisdictional statutes such as 28 U.S.C. §1331 or §1337. This does not completely abrogate the principle that I should not reach out to deal with that constitutional question in the context of this case. Indeed, the constitutional issue has different aspects in a case against a separate legal commercial entity than a case against a foreign government.

law or if it requires the construction of federal legal principles for its disposition. Lindy v. Lynn, 501 F.2d 1367 (3d Cor. 1974). There can be no question that an action under §905(b) of the LHWCA meets all of these requirements. Griffith v. Wheeling-Pittsburgh Steel Corp., 610 F.2d 116 (3d Cir. 1979); Rich v. U.S. Lines, 596 F.2d 541 (3d Cir. 1979); Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir.) cert. denied, 434 U.S. 861 (1977); McCarthy v. Silver Bulk Shipping Ltd., 487 F. Supp. 1021 (E.D. Pa. 1980); see City Stores Company v. Shull, 161 F. Supp. 459 (D. Md. 1958) (jurisdiction exists under 28 U.S.C. §1331 even in a case brought under the LHWCA as adopted in the District of Columbia because of the national policy and federal common law implicated).

What defendant wishes me to read into §1330 from the legislative history is that §1330 is the sole source of jurisdiction over a foreign sovereign. At first glance this is an attractive

assumption.[9] However, the implications of such a reading are disturbing.

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[9]Others have reached this conclusion.

> Section 1330 confers original jurisdiction on the district court of 'any nonjury civil action' against a foreign state as defined in § 1603(a), without regard to the amount in controversy. A literal reading of this language would make actions for equitable relief cognizable under § 1330 independent of amount in controversy, and actions for money damages cognizable only under § 1331 when the amount in controversy exceeds $10,000. The legislative history makes it abundantly clear, however, that the words 'any nonjury action' were used to exclude a jury trial rather than describe a category of civil actions not triable to a jury. Further, the addition of § 1441(d) makes it plain that one assumption underlying the 1976 amendments was that in actions against a foreign sovereign there is no right to a jury trial under the Seventh Amendment. If this assumption is correct, then under Rule 38 and 39 such actions are nonjury actions, independent of the
>
> (Footnote continued)

First, §1330 does not on its face state that it is to be the exclusive source of federal jurisdiction in all suits against foreign sovereigns. Second, defendant's reading of § 1330 would mean that Congress revoked the right to a jury trial in a whole range of traditional cases at law without consideration of

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> relief sought, except in cases in which trial by jury is provided for by statute. Of course it would be within the power of Congress to provide for a jury trial in original actions but not in removed actions, but the reason for such a distinction is obscure. Thus both the text and the legislative history lead to the conclusion that any action as to which the foreign state is not immune may be brought in the district court, independent of the amount in controversy, and in no such action is there a right to jury trial.

1 MOORE'S FEDERAL PRACTICE ¶0.66[4].

constitutional implications.[10] Third, defendants would have me hold that, sub nom, Congress amended a whole range of jurisdictional statutes and case law on determining district court jurisdiction with §1330. A district court would not only no longer have jurisdiction over a suit against a commercial corporation that happened to be owned fifty-one percent by a foreign state under 28 U.S.C. §1332, but in addition there would be no

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[10] It is common to find an anaylsis of the constitutionality of new legislation prepared by the Congressional or Administration staff when the legislature recognizes a constitutional issue is created by that legislation. None appears in the House Report on FSIA. This is evidence that Congress was not focusing on the jury trial issue when the FSIA was drafted or considered. The only indication that it was considered are some citations to statutes involving nonjury trials against the United States. This issue will now be brought clearly to Congress's attention and it may take appropriate action to clarify the FSIA.

jurisdiction in federal question cases (28 U.S.C. §1331); civil rights actions (28 U.S.C. §1343); or other actions relating to regulation of interstate commerce (28 U.S.C. §1337), all of which traditionally are tried by a jury.[11]

I give strong credence to defendant's argument that the legislative history of the FSIA evidences an intent that cases against foreign sovereigns be tried on a nonjury basis. However, such an intent is not unequivocally represented in the statutory language. There was no expression of an intent to limit federal question jurisdiction. The legislative history also reveals that the jury trial

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[11]The Court of Appeals for the District of Columbia faced a similar question in Trans-Bay Engineers v. Hills, 51 F.2d 370 (D.C. Cir. 1976). There the court held that even though a jurisdictional statute existed which was normally relied on in suits such as the one before the court both to overcome the sovereign immunity of the United States and to establish jurisdiction,that other jurisdictional statutes could also be relied on, specifically 28 U.S.C. §§1332 and 1331.

issue was not a central focus of Congressional concern, but a tangential aspect of the FSIA. Given my respect for the sanctity of the right to a jury and the difficult issue of constitutional law presented if I do otherwise, I interpret my jurisdiction to extend to a jury trial in the instant case. Given the difficult and controlling issue of law in this case, I will be inclined, if asked, to certify this ruling for interlocutory appeal. See 28 U.S.C. §1292(b).If I am incorrect, then empaneling a jury will be a waste of judicial resources. If I am correct, the law will be quickly clarified before cases tried nonjury over objections must be retried. I urge the court of appeals to accept interlocutory appeal in this case in recognition that other such cases are accruing on the docket of the district court, and a prompt resolution of the legal issue will avoid either a violation of constitutional rights or the waste of judicial resources in these cases. Both defendant and plaintiff urged the court to certify this decision for interlocutory appeal even prior to oral argument.

Counsel are from firms specializing in admiralty and related litigation, and have informed the court that the issue under current concern is placing a cloud on many cases in federal court. I have stayed the trial of similar cases on my docket pending resolution of this issue. This chambers has received direct inquiry from federal judges in several states regarding this case. Members of the bar had informed those judges of the extensive briefing and oral argument on this case and the intervention of the United States. Those judges await a definitive decision from a court of appeals, as do many of my colleagues in the Eastern District of Pennsylvania. I will grant a motion for certification of interlocutory appeal under 28 U.S.C. §1292(b) as soon as a formal motion and order are presented on the record. I urge the court of appeals to grant the appeal. See Zenith v. Matushita Electrical Industrial Co., Ltd.,

478 F.Supp. 889 (E.D. Pa. 1979).[12]

VII. CONCLUSION

I reject defendant's construction of §1330 and find at least two jurisdictional bases for granting a jury trial in the instant case -- 28 U.S.C. §1332 and 28 U.S.C. §1331.[13]

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[12]All counsel in this case have elucubrated in a most commendable fashion. Attorneys Charles Sovel and E. Alfred Smith and Mr. Rostau and Mr. Buck of the Department of Justice presented their arguments professionally, exhaustively and with extreme intellect and creativity. I commend all counsel for superior performances.

[13]The policy implication of defendant's position is disturbing to the court, but I have not allowed these concerns to involve themselves in my judgment. These concerns are for Congress. It is not apparent that Congress fully considered the implications of the special status they grant the "corporate" arms of socialist governments and other government controlled foreign corporations in the FSIA if they intended to do as defendant asserts. American citizens have

(Footnote continued)

Therefore, the motion to strike the jury trial demand will be denied.[14]

/s/ Edward N. Cahn, Jr.
Edward N. Cahn

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rights to a jury trial for torts and breaches of contract against a corporation until a foreign government takes it over. If a foreign company for any reason becomes subject to fifty-one percent ownership by a foreign government, and from that point on American citizens are deprived of their rights to a jury trial for a whole range of actions against that company. Yet all other foreign and domestic corporations must answer to a jury for their various frauds, torts, and breaches of contract.

[14]My conclusion is that the jury trial issue was tangential to the main purpose running through the entire history of the Act -- to give the federal courts the question of applying the doctrine of sovereign immunity and guidelines for that application. I could agree with defendant that Congress meant jurisdiction against a foreign sovereign to be based solely on §1330. However, my belief that a strong argument can be made for plaintiff's right to a jury trial, and the rule of statutory construction

(Footnote continued)

directing me to avoid that constitutional issue if appropriate, would lead me not to strike the jury trial demand but dismiss for lack of jurisdiction. Since this is a "jury" civil action and not a "nonjury civil action" I have no jurisdiction. Plaintiff would be relegated to state court for a jury trial. Defendant could not remove the case to federal court because the law of the case would be that this court had no original jurisdiction. See 28 U.S.C. §1441. This whole process leaves the determination of foreign sovereign immunity to state courts. This would abrogate the clear main policy of the FSIA in order to honor a tangential and arguable Congressional intent to deny a jury trial. I will not cut off the FSIA's nose to spite its face. Therefore, I reject this course of action.

We note that the detailed references to Chapter 97 in §1330 might indicate that it was intended to be the sole basis of jurisdiction in cases where foreign sovereigns are defendants. It is these inconsistencies in the FSIA which make this a difficult issue, and why I urge the court of appeals to accept interlocutory appeal.

The plaintiff has argued in the alternative that the term "nonjury civil action" in §1330 be interpreted in light

(Footnote continued)

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of the Supreme Court definition of nonjury actions in cases construing the Seventh Amendment. Thus, I would read §1330 to apply to actions sounding in equity or admiralty, or where a government agency seeks to enforce a public right. This does not appear to be the intent of the legislation, and I need not reach this issue since I find jurisdiction based on other sections of Title 28. See notes 1 and 3, supra.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CALVIN REX	:	CIVIL ACTION
v.	:	
CIA. PERVANA DE VAPORES, S.A.	:	NO.78-3694

O R D E R

AND NOW, this 24th day of June, 1980, IT IS ORDERED that defendant's motion to strike plaintiff's demand for a jury trial is DENIED.

BY THE COURT:

/s/ Edward N. Cahn
Edward N. Cahn, J.

FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

P.L. 94-583. see page 90 Stat. 2891

House Report (Judiciary Committee) No. 94-1487, Sept. 9, 1976 [To accompany H.R. 11315]

Senate Report (Judiciary Committee) No. 94-1310, Sept. 27, 1976 [To accompany S. 3553]

Cong. Record Vol. 122 (1976)

DATES OF CONSIDERATION AND PASSAGE

House September 29, 1976

Senate October 1, 1976

The House bill was passed in lieu of the Senate bill.

The House Report is set out.

HOUSE REPORT NO. 94-1487

[page 1]

The Committee on the Judiciary, to whom was referred the bill (H.R. 11315) to define the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

* * * * * * * * * *

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PURPOSE

The purpose of the proposed legislation, as amended, is to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity.

STATEMENT

The bill H.R. 11315 was introduced in accordance with the recommendations of an executive communication transmitted to the Congress by the Departments of State and Justice, and both Departments recommend its enactment with the amendments recommended in this report. The bill was the subject of hearings on June 2, 1976 and June 4, 1976 before this Committee's Subcommittee on Administrative Law and Governmental Relations. The amendments recommended to the bill are the result of matters discussed at those hearings and further developed in consultation with representatives of the Departments of State and Justice.

At the hearings on the bill it was pointed out that American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes. Instances of such contact occur when U.S. businessmen sell goods to a

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foreign state trading company, and disputes may arise concerning the purchase price. Another is when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention. Still another example occurs when a citizen crossing the street may be struck by an automobile owned by a foreign embassy.

At present, there are no comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state. Unlike other legal systems, U.S. law does not afford plaintiffs and their counsel with a means to commence a suit that is specifically addressed to foreign state defendants. It does not provide firm standards as to when a foreign state may validly assert the defense of sovereign immunity; and, in the event a plaintiff should obtain a final judgment against a foreign state or one of its trading companies, our law does not provide the plaintiff with any means to obtain satisfaction of that judgment through execution against ordinary commercial assets.

In a modern world where foreign state enterprises are every day participants in commercial activities, H.R. 11315 is urgently needed legislation. The bill, which has been drafted over many years and which has involved extensive consultations within the administration, among bar associations and in the academic community, would accomplish four objectives:

First, the bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis). This principle was adopted by the Department of State in 1952 and has been followed by the courts and by the executive branch ever since. Moreover, it is regularly applied against the United States in suits against the U.S. Government in foreign courts.

Second, the bill would insure that this restrictive principle of immunity is applied in litigation before U.S. courts. At present, this is

not always the case. Today, when a foreign state wishes to assert immunity, it will often request the Department of State to make a formal suggestion of immunity to the court. Although the State Department espouses the restrictive principle of immunity, the foreign state may attempt to bring diplomatic influences to bear upon the State Department's determination. A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity. As was brought out in the hearings on the bill, U.S. immunity practice would conform to the practice in virtually every other country—where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.

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Third, this bill would for the first time in U.S. law, provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state. This would render unnecessary the practice of seizing and attaching the property of a foreign government for the purpose of obtaining jurisdiction.

Fourth, the bill would remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state. Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment. H.R. 11315 seeks to restrict this broad immunity from execution. It would conform the execution immunity rules more closely to the jurisdiction immunity rules. It would provide the judgment creditor some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment.

Background

Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state. It differs from diplomatic immunity (which is drawn into issue when an individual diplomat is sued). H.R. 11315 deals solely with sovereign immunity.

Sovereign immunity as a doctrine of international law was first recognized in our courts in the landmark case of *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116 (1812). There, Chief Justice Marshall upheld a plea of immunity, supported by an executive branch suggestion, by noting that a recognition of immunity was supported by the law and practice of nations. In the early part of this century, the Supreme Court began to place less emphasis on whether immunity was supported by the law and practice of nations, and relied instead on the practices and policies of the State Department. This trend reached its culmination in *Ex Parte Peru*, 318 U.S. 578 (1943)[1] and *Mexico* v. *Hoffman*, 324 U.S. 30 (1945).[2]

Partly in response to these decisions and partly in response to developments in international law, the Department of State adopted the restrictive principle of sovereign immunity in its "Tate Letter" of 1952. 26 Department of State Bulletin 984. Thus, under the Tate letter, the Department undertook, in future sovereign immunity determinations, to recognize immunity in cases based on a foreign state's public acts, but not in cases based on commercial or private acts. The Tate letter, however, has posed a number of difficulties. From a legal standpoint, if the Department applies the restrictive principle in a given case, it is in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts. Moreover, it does not have the machinery to take evidence, to hear witnesses, or to afford appellate review.

From a foreign relations standpoint, the initiative is left to the foreign state. The foreign state chooses which sovereign immunity determinations it will leave to the courts, and which it will take to the State Department. The foreign state also decides when it will attempt to exert diplomatic influences, thereby making it more difficult for the State Department to apply the Tate letter criteria.

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1. 63 S.Ct. 793, 87 L.Ed. 1014.
2. 65 S.Ct. 530, 89 L.Ed. 729.

From the standpoint of the private litigant, considerable uncertainty results. A private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign state will not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State.

The United States in Foreign Courts

Since World War II, the United States has increasingly become involved in litigation in foreign courts. This litigation has involved such diverse activities as the purchase of goods and services by our embassies, employment of local personnel by our military bases, the construction or lease of buildings for our foreign missions, and traffic accidents involving U.S. Government-owned vehicles.

In the mid-1950's, when the United States first became involved in foreign suits on a large scale, foreign counsel retained by the Department of Justice were instructed to plead sovereign immunity in almost every instance. However, the executive branch learned that almost every country in Western Europe followed the restrictive principle of sovereign immunity and the Government's pleas of immunity were routinely denied in tort and contract cases where the necessary contacts with the forum were present. Thus, in the 1960's, it became the practice of the Department of Justice to avoid claiming immunity when the United States was sued in countries that had adopted the restrictive principle of immunity, but to invoke immunity in those remaining countries that still held to the absolute immunity doctrine. Beginning in the early 1970's, it became the consistent practice of the Department of Justice not to plead sovereign immunity abroad in instances where, under the Tate letter standards, the Department would not recognize a foreign state's immunity in this country.

In virtually every country, the United States has found that sovereign immunity is a question of international law to be determined by the courts. The United States cannot take recourse to a foreign affairs agency abroad as other states have done in this country when they seek a suggestion of immunity from the Department of State.

History of the Bill

H.R. 11315 is the product of many years of work by the Departments of State and Justice, in consultation with members of the bar and the academic community. Study of possible legislation began in the mid-1960's. In the early 1970's, a number of draft bills were prepared and submitted for comment to many authorities and practitioners in the international law field. On January 31, 1973, a bill (H.R. 3493) was introduced in the 93d Congress, and referred to the Committee on the Judiciary. The bill H.R. 3493 was the subject of a subcommittee hearing on June 7, 1973. Although extensive advice had already been obtained from the private sector, in the course of the subcommittee's consideration it became apparent that a few segments of the private bar had not been fully consulted. It was pointed out that the 93d Congress bill contained some technical deficiencies which could be remedied—particularly with respect to maritime cases and the jurisdictional provisions. The American Bar Association at

the August 1976 meeting of its House of Delegates adopted a resolution urging approval of H.R. 11315. The letter of that association indicating its support is set out at the end of this report.

The current bill, H.R. 11315, contains revised language. It is essentially the same bill as was introduced in 1973, except for the technical improvements that have been made in the interim.

Committee Amendments

The committee, after careful consideration of the bill, made the following amendments:

1. In sections 1604 and 1609 of the bill, the committee has preserved the reference to "existing international agreements" but has deleted the language that would make this bill subject to "future" agreements. Mention of future agreements was found to be unnecessary and misleading. The purpose for including the reference was to take into account the possibility that sovereign immunity might become the subject of an international convention. Such a convention would, under article VI of the Constitution, take precedence, whether or not the bill was made expressly subject to a future international agreement. Moreover, it was thought best to eliminate any possible question that this language might be construed to authorize a future international agreement. However, the reference to existing international agreements is essential to make it clear that this bill would not supersede the special procedures provided in existing international agreements, such as the North Atlantic Treaty—Status of Forces Agreement.

2. Section 1606, relating to public debt obligations, has been deleted and the former section 1605(c) has been renumbered as section 1606. The public debt provision was, at best, very limited. It applied only to debt obligations incurred "for general governmental purposes." It did not apply to debts incurred either for specific government projects (such as the building of a dam) or to further a commercial activity. In practice, the provision would have had virtually no effect because U.S. underwriters of foreign government bonds and U.S. banks lending to foreign governments would invariably include an express waiver of immunity in the debt instrument. Moreover, both a sale of bonds to the public and a direct loan from a U.S. commercial bank to a foreign government are activities which are of a commercial nature and should be treated like other similar commercial transactions. Such commercial activities would not otherwise give rise to immunity and would be subject to U.S. regulation, such as that provided by the securities laws. Thus, on reconsideration of all of the factors, the committee has concluded that a public debt provision would serve no significant purpose and would be inappropriate.

3. Former section 1605(c), renumbered as section 1606, has also been revised in two other respects. First, it makes clear that the exception for punitive damages applies to political subdivisions of foreign states, as well as to the foreign state itself. This accords with current international practice. Second, it would eliminate the exception for interest prior to judgment. Such an exception is not supported by international practice. If a foreign state is not immune from suit, it should be liable for interest to the same extent as a private party.

4. Section 1608 has been substantially revised, with the principal revisions being in subsection (a). A number of bar association studies which otherwise expressed full support for the bill, pointed out that subsection (a), as previously drafted, created a significant gap in its provisions concerning service upon a foreign state through diplomatic channels. The Departments of Justice and State have reconsidered this provision and have indicated their preference for the revised language in the committee amendment. The committee has revised subsection (a) to fill the prior gap, and, at the same time, to minimize potential irritants to relations with foreign states. Subsection (a), as revised, would provide that service of a summons and complaint also be accompanied by a new document, called a notice of suit. The notice of suit is designed to provide a foreign state with an introductory explanation of the lawsuit, together with an explanation of the legal significance of the summons, complaint, and service.

The revised paragraphs (a)(2) and (b)(2) of section 1608 give emphasis to service under an "applicable international convention on service of judicial documents." At present, there is such an applicable international convention—the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, TIAS 6638, 20 UST 361—to which the Senate gave its advice and consent to ratification, and which entered into force for the United States in 1969. At present 18 nations are parties to this convention. In the committee's view, if a country has entered into such an international convention, priority should be given to this method for service.

Subsection (d) has been revised to delete the references to cross-claims and counterclaims. The existence of a counterclaim against a foreign state indicates that the foreign state has already entered an appearance in the lawsuit; thus, there is no necessity for affording the foreign state with a special time period in which to respond to a counterclaim. When a cross-claim is filed against a foreign state, rules 19 and 20, of the Federal Rules of Civil Procedure, require that original service be made. Under rules the bill, this would mean service under section 1608 (a) or (b).

5. Finally, your committee has made a few perfecting amendments in the bill's provisions involving maritime jurisdiction. These include changes in section 1605(b) to make it clear that the delivery of notice to a master of a vessel under paragraph (1) does not itself constitute "service"; and to make clear, in cases where the plaintiff is unaware that he has arrested a foreign state-owned vessel, that the 10-day period in paragraph (2) does not begin to run until the plaintiff has determined that a foreign state owns the vessel. Section 1609 has been amended to make it clear that it applies to arrests of a vessel, as well as to attachment and execution.

Conclusion

On the basis of the facts outlined in the executive communication and the testimony at the hearings on the bill, the committee finds that there is a clearly defined need for the enactment of these provisions into law. It is recommended that the amended bill be approved.

SECTION-BY-SECTION ANALYSIS

This bill, entitled the "Foreign Sovereign Immunities Act of 1976," sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities. It is also designed to bring U.S. practice into conformity with that of most other nations by leaving sovereign immunity decisions exclusively to the courts, thereby discontinuing the practice of judicial deference to "suggestions of immunity" from the executive branch. (See *Ex Parte Peru*, 318 U.S. 578, 588–589 (1943)[3].)

The bill is not intended to affect the substantive law of liability. Nor is it intended to affect either diplomatic or consular immunity, or the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong.

Aside from setting forth comprehensive rules governing sovereign immunity, the bill prescribes: the jurisdiction of U.S. district courts in cases involving foreign states, procedures for commencing a lawsuit against foreign states in both Federal and State courts, and circumstances under which attachment and execution may be obtained against the property of foreign states to satisfy a judgment against foreign states in both Federal and State courts.

Constitutional authority for enacting such legislation derives from the constitutional power of the Congress to prescribe the jurisdiction of Federal courts (art. I, sec. 8, cl. 9; art. III, sec. 1); to define offenses against the "Law of Nations" (art. I, sec. 8, cl. 10); to regulate commerce with foreign nations (art. I, sec. 8, cl. 3); and "to make all Laws which shall be necessary and proper for carrying into Execution * * * all * * * Powers vested * * * in the Government of the United States," including the judicial power of the United States over controversies between "a State, or the Citizens thereof, and foreign States * * *." (art. I, sec. 8, cl. 18; art. III, sec. 2, cl. 1). See *National Bank* v. *Republic of China*, 348 U.S. 356, 370–71 (1955)[4] (Reed J., dissenting); *cf. Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964).[5]

The committee wishes to emphasize that this section-by-section analysis supersedes the section-by-section analysis that accompanied the earlier version of the bill in the 93rd Congress (that is, S. 566 and H.R. 3493, 93d Cong., 1st sess.); the prior analysis should not be consulted in interpreting the current bill and its provisions, and no inferences should be drawn from differences between the two.

SEC. 2. JURISDICTION IN ACTIONS AGAINST FOREIGN STATES

Section 2 of the bill adds a new section 1330 to title 28 of the United States Code, and provides for subject matter and personal jurisdiction of U.S. district courts over foreign states and their political subdivisions, agencies, and instrumentalities. Section 1330

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3. 63 S.Ct. 793, 87 L.Ed. 1014.
4. 75 S.Ct. 423, 99 L.Ed. 389, rehearing denied 75 S.Ct. 698, 349 U.S. 913, 99 L.Ed. 1247.
5. 84 S.Ct. 923, 11 L.Ed.2d 804.

provides a comprehensive jurisdictional scheme in cases involving foreign states. Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences. Plaintiffs, however, will have an election whether to proceed in Federal court or in a court of a State, subject to the removal provisions of section 6 of the bill.

(a) *Subject Matter Jurisdiction.*—Section 1330(a) gives Federal district courts original jurisdiction in personam against foreign states (defined as including political subdivisions, agencies, and instrumentalities of foreign states). The jurisdiction extends to any claim with respect to which the foreign state is not entitled to immunity under sections 1605–1607 proposed in the bill, or under any applicable international agreement of the type contemplated by the proposed section 1604.

As in suits against the U.S. Government, jury trials are excluded. See 28 U.S.C. 2402. Actions tried by a court without jury will tend to promote a uniformity in decision where foreign governments are involved.

In addition, the jurisdiction of district courts in cases against foreign states is to be without regard to amount in controversy. This is intended to encourage the bringing of actions against foreign states in Federal courts. Under existing law, the district courts have diversity jurisdiction in actions in which foreign states are parties, but only where the amount in controversy exceeds $10,000. 28 U.S.C. 1332(a)(2) and (3). (See analysis of sec. 3 of the bill, below.)

A judgment dismissing an action for lack of jurisdiction because the foreign state is entitled to sovereign immunity would be determinative of the question of sovereign immunity. Thus, a private party, who lost on the question of jurisdiction, could not bring the same case in a State court claiming that the Federal court's decision extended only to the question of Federal jurisdiction and not to sovereign immunity.

(b) *Personal Jurisdiction.*—Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states (including political subdivisions, agencies, and instrumentalities of foreign states). It is patterned after the long-arm statute Congress enacted for the District of Columbia, Public Law 91–358, sec. 132(a), title I, 84 Stat. 549. The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. Cf. *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945);[6] and *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957).[7] For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605–1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction. Besides incorporating these jurisdictional contacts by reference, section 1330(b) also satisfies the due process requirement of adequate notice by prescribing that proper service be

6. 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057.
7. 78 S.Ct. 199, 2 L.Ed.2d 223.

made under section 1608 of the bill. Thus, sections 1330(b), 1608, and 1605–1607 are all carefully interconnected.

(c) *Effect of an Appearance.*—Section 1330(c) states that a mere apperance by a foreign state in an action does not confer personal jurisdiction with respect to claims which could not be brought as an independent action under this bill. The purpose is to make it clear that a foreign state does not subject itself to claims unrelated to the action solely by virtue of an appearance before a U.S. court. While the plaintiff is free to amend his complaint, he is not permitted to add claims for relief not based on transactions or occurrences listed in the bill. The term "transaction or occurrence" includes each basis set forth in sections 1605–1607 for not granting immunity, including waivers.

. . . .

SEC. 3. DIVERSITY JURISDICTION AS TO FOREIGN STATES

Section 3 of the bill amends those provisions of 28 U.S.C. 1332 which relate to diversity jurisdiction of U.S. district courts over foreign states. Since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous. The amendment deletes references to "foreign states" now found in paragraphs (2) and (3) of 28 U.S.C. 1332(a), and adds a new paragraph (4) to provide for diversity jurisdiction in actions brought by a foreign state as plaintiff. These changes would not affect the applicability of section 1332 to entities that are both owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332 (c) and (d). See analysis to section 1603(b).

SEC. 4. NEW CHAPTER 97: SOVEREIGN IMMUNITY PROVISIONS

Section 4 of the bill adds a new chapter 97 to title 28, United States Code, which sets forth the legal standards under which Federal and State courts would henceforth determine all claims of sovereign immunity raised by foreign states and their political subdivisions, agencies, and instrumentalities. The specific sections of chapter 97 are as follows:

Section 1602. Findings and declaration of purpose

Section 1602 sets forth the central premise of the bill: That decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law.

Although the general concept of sovereign immunity appears to be recognized in international law, its specific content and application have generally been left to the courts of individual nations. There is, however, a wide acceptance of the so-called restrictive theory of sovereign immunity; that is, that the sovereign immunity of foreign states should be "restricted" to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform. This restrictive theory has been adhered to by the Department of State since the "Tate Letter" of May 19, 1952. (26 Dept. of State Bull. 984 (1952).)

Section 1603. Definitions

Section 1603 defines five terms that are used in the bill:

(a) *Foreign state.*—Subsection (a) defines the term foreign state as used in all provisions of chapter 97, except section 1608. In section 1608, the term "foreign state" refers only to the sovereign state itself.

As the definition indicates, the term "foreign state" as used in every other section of chapter 97 includes not only the foreign state but also political subdivisions, agencies and instrumentalities of the foreign state. The term "political subdivisions" includes all governmental units beneath the central government, including local governments.

(b) *Agency or instrumentality of a foreign state.*—Subsection (b) defines an "agency or instrumentality of a foreign state" as any entity (1) which is a separate legal person, (2) which is an organ of a foreign state or of a political subdivision of a foreign state, or a majority of whose shares or other ownership interest is owned by a foreign state or by a foreign state's political subdivision, and (3) which is neither a citizen of a State of the United States as defined in 28 U.S.C. 1332(c) and (d) nor created under the laws of any third country.

The first criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name.

The second criterion requires that the entity be either an organ of a foreign state (or of a foreign state's political subdivision), or that a majority of the entity's shares or other ownership interest be owned by a foreign state (or by a foreign state's political subdivision). If such entities are entirely owned by a foreign state, they would of course be included within the definition. Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision.

The third criterion excludes entities which are citizens of a State of the United States as defined in 28 U.S.C. 1332 (c) and (d)—for example a corporation organized and incorporated under the laws of the State of New York but owned by a foreign state. (See *Amtorg Trading Corp.* v. *United States*, 71 F. 2d 524 (C.C.P.A. 1934).) Also excluded are entities which are created under the laws of third countries. The rationale behind these exclusions is that if a foreign state acquires or establishes a company or other legal entity in a foreign country, such entity is presumptively engaging in activities that are either commercial or private in nature.

An entity which does not fall within the definitions of sections 1603 (a) or (b) would not be entitled to sovereign immunity in any case before a Federal or State court. On the other hand, the fact that an entity is an "agency or instrumentality of a foreign state" does not in itself establish an entitlement to sovereign immunity. A court would have to consider whether one of the sovereign immunity exceptions contained in the bill (see sections 1605–1607 and 1610–1611) was applicable.

As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms,

including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

(c) *United States.*—Paragraph (c) of section 1603 defines "United States" as including all territory and waters subject to the jurisdiction of the United States.

(d) *Commercial activity.*—Paragraph (c) of section 1603 defines the term "commercial activity" as including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A "regular course of commercial conduct" includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act."

As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.

By contrast, a foreign state's mere participation in a foreign assistance program administered by the Agency for International Development (AID) is an activity whose essential nature is public or governmental, and it would not itself constitute a commercial activity. By the same token, a foreign state's activities in and "contacts" with the United States resulting from or necessitated by participation in such a program would not in themselves constitute a sufficient commercial nexus with the United States so as to give rise to jurisdiction (see sec. 1330) or to assets which could be subjected to attachment or execution with respect to unrelated commercial transactions (see sec. 1610(b)). However, a transaction to obtain goods or services from private parties would not lose its otherwise commercial character because it was entered into in connection with an AID program. Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States.

The courts would have a great deal of latitude in determining what is a "commercial activity" for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable. Activities such as a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition.

(e) *Commercial activity carried on in the United States by a foreign state.*—As paragraph (d) of section 1603 indicates, a commercial activity carried on in the United States by a foreign state would include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction or act having a "substantial contact" with the United States. This definition includes cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States (cf. § 1605(a)(5)), and an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States—for example, loans, guarantees or insurance provided by the Export-Import Bank of the United States. It will be for the courts to determine whether a particular commercial activity has been performed in whole or in part in the United States. This definition, however, is intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff.

Section 1604. Immunity of foreign states from jurisdiction

New chapter 97 of title 28, United States Code, starts from a premise of immunity and then creates exceptions to the general principle. The chapter is thus cast in a manner consistent with the way in which the law of sovereign immunity has developed. Stating the basic principle in terms of immunity may be of some advantage to foreign states in doubtful cases, but, since sovereign immunity is an affirmative defense which must be specially pleaded, the burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state—that is, an act not within the exceptions in sections 1605–1607. Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.

The immunity from jurisdiction provided in section 1604 applies to proceedings in both Federal and State courts. Section 1604 would be the only basis under which a foreign state could claim immunity from the jurisdiction of any Federal or State court in the United States.

All immunity provisions in sections 1604 through 1607 are made subject to "existing" treaties and other international agreements to which the United States is a party. In the event an international agreement expressly conflicts with this bill, the international agreement would control. Thus, the bill would not alter the rights or duties of the United States under the NATO Status of Forces Agreement or similar agreements with other countries; nor would it alter the provisions of commercial contracts or agreements to which the United States is a party, calling for exclusive nonjudicial remedies through arbitration or other procedures for the settlement of disputes.

Treaties of friendship, commerce and navigation and bilateral air transport agreements often contain provisions relating to the immunity

of foreign states. Many provisions in such agreements are consistent with, but do not go as far as, the current bill. To the extent such international agreements are silent on a question of immunity, the bill would control; the international agreement would control only where a conflict was manifest.

Section 1605. General exceptions to the jurisdictional immunity of foreign states

Section 1605 sets forth the general circumstances in which a claim of sovereign immunity by a foreign state, as defined in section 1603(a), would not be recognized in a Federal or State court in the United States.

(a)(1) *Waivers.*—Section 1605(a)(1) treats explicit and implied waivers by foreign states of sovereign immunity. With respect to explicit waivers, a foreign state may renounce its immunity by treaty, as has been done by the United States with respect to commercial and other activities in a series of treaties of friendship, commerce, and navigation, or a foreign state may waive its immunity in a contract with a private party. Since the sovereign immunity of a political subdivision, agency or instrumentality of a foreign state derives from the foreign state itself, the foreign state may waive the immunity of its political subdivisions, agencies or instrumentalities.

With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.

The language, "notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver," is designed to exclude a withdrawal of the waiver both after and before a dispute arises except in accordance with the terms of the original waiver. In other words, if the foreign state agrees to a waiver of sovereign immmunity in a contract, that waiver may subsequently be withdrawn only in a manner consistent with the expression of the waiver in the contract. Some court decisions have allowed subsequent and unilateral rescissions of waivers by foreign states. But the better view, and the one followed in this section, is that a foreign state which has induced a private person into a contract by promising not to invoke its immunity cannot, when a dispute arises, go back on its promise and seek to revoke the waiver unilaterally.

(a)(2) *Commercial activities having a nexus with the United States.*—Section 1605(a)(2) treats what is probably the most important instance in which foreign states are denied immunity, that in which the foreign state engages in a commercial activity. The definition of a "commercial activity" is set forth in section 1603(d) of the bill, and is discussed in the analysis to that section.

Section 1605(a)(2) mentions three situations in which a foreign state would not be entitled to immunity with respect to a claim based upon a commercial activity. The first of these situations is where the "commercial activity [is] carried on in the United States by the for-

eign state." This phrase is defined in section 1603(e) of the bill. See the analysis to that section.

The second situation, an "act performed in the United States in connection with a commercial activity of the foreign state elsewhere," looks to conduct of the foreign state in the United States which relates either to a regular course of commercial conduct elsewhere or to a particular commercial transaction concluded or carried out in part elsewhere. Examples of this type of situation might include: a representation in the United States by an agent of a foreign state that leads to an action for restitution based on unjust enrichment; an act in the United States that violates U.S. securities laws or regulations; the wrongful discharge in the United States of an employee of the foreign state who has been employed in connection with a commercial activity carried on in some third country.

Although some or all of these acts might also be considered to be a "commercial activity carried on in the United States," as broadly defined in section 1603(e), it has seemed advisable to provide expressly for the case where a claim arises out of a specific act in the United States which is commercial or private in nature and which relates to a commercial activity abroad. It should be noted that the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action.

The third situation—"an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States"—would embrace commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965).

Neither the term "direct effect" nor the concept of "substantial contacts" embodied in section 1603(e) is intended to alter the application of the Sherman Antitrust Act, 15 U.S.C. 1, *et seq.*, to any defendant. Thus, the bill does not affect the holdings in such cases as *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U.S. 87 (1913)[8]; or *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F. 2d 804 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969)[9].

(a)(3) *Expropriation claims.*—Section 1605(a)(3) would, in two categories of cases, deny immunity where "rights in property taken in violation of international law are in issue." The first category involves cases where the property in question or any property exchanged for such property is present in the United States, and where such presence is in connection with a commercial activity carried on in the United States by the foreign state, or political subdivision, agency or instrumentality of the foreign state. The second category is where the property, or any property exchanged for such property, is (i) owned or operated by an agency or instrumentality of a foreign state and (ii) that agency or instrumentality is engaged in a commercial activity in the United States. Under the second category, the property need not be present in connection with a commercial activity of the agency or instrumentality.

The term "taken in violation of international law" would include the nationalization or expropriation of property without payment of the

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8. 33 S.Ct. 443, 57 L.Ed. 742.
9. 89 S.Ct. 872, 21 L.Ed.2d 784.

prompt adequate and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature. Since, however, this section deals solely with issues of immunity, it in no way affects existing law on the extent to which, if at all, the "act of state" doctrine may be applicable. See 22 U.S.C. 2370(e)(2).[1]

(a)(4) *Immovable, inherited, and gift property.*— Section 1605(a)(4) denies immunity in litigation relating to rights in real estate and in inherited or gift property located in the United States. It is established that, as set forth in the "Tate Letter" of 1952, sovereign immunity should not be granted in actions with respect to real property, diplomatic and consular property excepted. 26 Department of State Bulletin 984 (1952). It does not matter whether a particular piece of property is used for commercial or public purposes.

It is maintainable that the exception mentioned in the "Tate Letter" with respect to diplomatic and consular property is limited to questions of attachment and execution and does not apply to an adjudication of rights in that property. Thus the Vienna Convention on Diplomatic Relations, concluded in 1961, 23UST 3227, TIAS 7502 (1972), provides in article 22 that the "premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution." Actions short of attachment or execution seem to be permitted under the Convention, and a foreign state cannot deny to the local state the right to adjudicate questions of ownership, rent, servitudes, and similar matters, as long as the foreign state's possession of the premises is not disturbed.

There is general agreement that a foreign state may not claim immunity when the suit against it relates to rights in property, real or personal, obtained by gift or inherited by the foreign state and situated or administered in the country where the suit is brought. As stated in the "Tate Letter," immunity should not be granted "with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary." The reason is that, in claiming rights in a decedent's estate or obtained by gift, the foreign state claims the same right which is enjoyed by private persons.

(a)(5) *Noncommercial torts.*—Section 1605(a)(5) is directed primarily at the problem of traffic accidents but is cast in general terms

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[1] The committee has been advised that in some cases, after the defense of sovereign immunity has been denied or removed as an issue, the act of state doctrine may be improperly asserted in an effort to block litigation. Under the act of state doctrine United States Courts may refuse to adjudicate the validity of purely public acts of foreign sovereigns, as distinguished from commercial acts committed and effective within their own territory. For example, in the Supreme Court's recent decision in *Dunhill* v. *Republic of Cuba*, 44 U.S.L.W. 4665 No. 73-1295 (May 24, 1976), the respondent having brought suit (and thus clearly having waived the defense of sovereign immunity) attempted to assert that a refusal to pay a commercial obligation was not reviewable because it was an "act of state".

The committee has found it unnecessary to address the act of state doctrine in this legislation since decisions such as that in the *Dunhill* case demonstrate that our courts already have considerable guidance enabling them to reject improper assertions of the act of state doctrine. For example, it appears that the doctrine would not apply to the cases covered by H.R. 11315, whose touchstone is a concept of "commercial activity" involving significant jurisdictional contacts with this country. The conclusions of the committee are in concurrence with the position of the government in its amicus brief to the Supreme Court in the *Dunhill* case where the Solicitor General stated:

"[U]nder the modern restrictive theory of sovereign immunity, a foreign state is not immune from suit on its commercial obligations. To elevate the foreign state's commercial acts to the protected status of 'acts of state' would frustrate this modern development by permitting sovereign immunity to reenter through the back door, under the guise of the act of state doctrine." (Amicus Brief of United States, p. 41.)

as applying to all tort actions for money damages, not otherwise encompassed by section 1605(a)(2) relating to commercial activities. It denies immunity as to claims for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state or its officials or employees, acting within the scope of their authority; the tortious act or omission must occur within the jurisdiction of the United States, and must not come within one of the exceptions enumerated in the second paragraph of the subsection.

As used in section 1605(a)(5), the phrase "tortious act or omission" is meant to include causes of action which are based on strict liability as well as on negligence. The exceptions provided in subparagraphs (A) and (B) of section 1605(a)(5) correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act, 28 U.S.C. 2680 (a) and (h).

Like other provisions in the bill, section 1605 is subject to existing international agreements (see section 1604), including Status of Forces Agreements; if a remedy is available under a Status of Forces Agreement, the foreign state is immune from such tort claims as are encompassed in sections 1605(a)(2) and 1605(a)(5).

Since the bill deals only with the immunity of foreign states and not its diplomatic or consular representatives, section 1605(a)(5) would not govern suits against diplomatic or consular representatives but only suits against the foreign state. It is noteworthy in this regard that while article 43 of the Vienna Convention on Consular Relations of 1963, 21 UST 77, TIAS 6820 (1970), expressly abolishes the immunity of consular officers with respect to civil actions brought by a third party for "damage arising from an accident in the receiving state caused by a vehicle, vessel or aircraft," there is no such provision in the Vienna Convention on Diplomatic Relations of 1961, *supra*. Consequently, no case relating to a traffic accident can be brought against a member of a diplomatic mission.

The purpose of section 1605(a)(5) is to permit the victim of a traffic accident or other noncommercial tort to maintain an action against the foreign state to the extent otherwise provided by law. See, however, section 1605(c).

(b) *Maritime liens.*—Section 1605(b) denies immunity to a foreign state in cases where (i) a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of that foreign state, (ii) the maritime lien is based upon a commercial activity of the foreign state, and (iii) the conditions in paragraphs (1) and (2) of section 1605(b) have been complied with.

The purpose of this subsection is the permit a plaintiff to bring suit in a U.S. district court arising out of a maritime lien involving a vessel or cargo of a foreign sovereign without arresting the vessel, by instituting an in personam action against the foreign state in a manner analogous to bringing such a suit against the United States. Cf. 46 U.S.C. 741, *et seq.* In view of section 1609 of the bill, section 1605(b) is designed to avoid arrests of vessels or cargo of a foreign state to commence a suit. Instead, as provided in paragraph (1), a copy of the summons and complaint must be delivered to the master or other person having possession of the vessel or cargo (such as the second in command of the ship).

If, however, the vessel or its cargo is arrested or attached, the plaintiff will lose his in personam remedy and the foreign state will

be entitled to immunity—except in the case where the plaintiff was unaware that the vessel or cargo of a foreign state was involved. This would be a rare case because the flag of the vessel, the circumstances giving rise to the maritime lien or the information contained in ship registries kept in ports throughout the United States should make known the ownership of the vessel in question, if not the cargo. By contrast, evidence that a party had relied on a standard registry of ships, which did not reveal a foreign state's interest in a vessel, would be prima facie evidence of the party's unawareness that a vessel of a foreign state was involved. More generally, a party could seek to establish its lack of awareness of the foreign state's ownership by submitting affidavits from itself and from its counsel. If, however, the vessel or cargo is mistakenly arrested, such arrest or attachment must, under section 1609, be immediately dissolved when the foreign state brings to the court's attention its interest in the vessel or cargo and, hence, its right to immunity from arrest.

Under paragraph (2), the plaintiff must also be able to prove that the procedures for service under section 1608(a) or (b) have commenced—for example, that the clerk of the court has mailed the requisite copies of the summons and complaint. The plaintiff need not show that service has actually been made under section 1608(c). The reason for this second requirement is to help make certain that the foreign state concerned receives prompt and actual notice of the institution of a suit in admiralty in the United States, even if the copies served on the master of the vessel should fail to reach the foreign state.

Section 1605(b) would not preclude a suit in accordance with other provisions of the bill—e.g., section 1605(a)(2). Nor would it preclude a second action, otherwise permissible, to recover the amount by which the value of the maritime lien exceeds the recovery in the first action.

Section 1606. Extent of liability

Section 1606 makes clear that if the foreign state, political subdivision, agency or instrumentality is not entitled to immunity from jurisdiction, liability exists as it would for a private party under like circumstances. However, the tort liability of a foreign state itself, and of its political subdivision (but not of an agency or instrumentality of a foreign state) does not extend to punitive damages. Under current international practice, punitive damages are usually not assessed against foreign states. See 5 Hackwork, Digest of International Law, 723–26 (1943); Garcia-Amador, State Reesponsibility, 94 Hague Recueil des Cours 365, 476–81 (1958). Interest prior to judgment and costs may be assessed against a foreign state just as against a private party Cf. 46 U.S.C. 743, 745.

Consistent with this section, a court could, when circumstances were clearly appropriate, order an injunction or specific performance. But this is not determinative of the power of the court to enforce such an order. For example, a foreign diplomat or official could not be imprisoned for contempt because of his government's violation of an injunction. See 22 U.S.C. 252. Also a fine for violation of an injunction may be unenforceable if immunity exists under sections 1609–1610.

The bill does not attempt to deal with questions of discovery. Existing law appears to be adequate in this area. For example, if a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply.[9] Or if a plaintiff sought to depose a diplomat in the United States or a high-ranking official of a foreign government, diplomatic and official immunity would apply. However, appropriate remedies would be available under Rule 37, F.R. Civ. P., for an unjustifiable failure to make discovery.

Section 1607. Counterclaims

Section 1607 applies to counterclaims against a foreign state which brings an action or intervenes in an action in a Federal or State court. It would deny immunity in three situations. First, immunity would be denied as to any counterclaim for which the foreign state would not be entitled to immunity under section 1605, if the counterclaim had been brought as a direct claim in a separate action against the foreign state. This provision is based upon article I of the European Convention on State Immunity 11 Int'l Legal Materials 470 (1972).

Second, even if a foreign state would otherwise be entitled to immunity under sections 1604–1606, it would not be immune from a counterclaim "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state." This is the same terminology as that used in rule 13(a) of the Federal Rules of Civil Procedure and is consistent with section 70(2)(b), Restatement of the Law, Second, Foreign Relations Law of the United States (1965). Certainly, if a foreign state brings or intervenes in an action based on a particular transaction or occurrence, it should not obtain the benefits of litigation before U.S. courts while avoiding any legal liabilities claimed against it and arising from that same transaction or occurrence. See, *Alfred Dunhill of London, Inc.*, v. *Cuba*, —— U.S. —— No. 73–1288, decided May 24, 1976).[10]

Third, notwithstanding that the foreign state may be immune under subsections (a) and (b), the foreign state nevertheless would not be immune from a setoff. Subsection (c) codifies the rule enunciated in *National Bank* v. *Republic of China*, 348 U.S. 356 (1955).[11]

Section 1608. Service; time to answer; default

Section 1608 sets forth the exclusive procedures with respect to service on, the filing of an answer or other responsive pleading by, and obtaining a default judgment against a foreign state or its political subdivisions, agencies or instrumentalities. These procedural provisions are intended to fill a void in existing Federal and State law, and to insure that private persons have adequate means for commencing a suit against a foreign state to seek redress in the courts.

Provisions in section 1608 are closely interconnected with other parts of the bill—particularly the proposed section 1330 and sections 1605–1607. If notice is served under section 1608 and if the jurisdictional contacts embodied in sections 1605–1607 are satisfied, personal jurisdiction over a foreign state would exist under section 1330(b). In addition to its integral role in the bill, section 1608 follows on the

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[9] e.g. 5 U.S.C. 552 concerning public information.

[10] 96 S.Ct. 1854, 48 L.Ed.2d 301.

[11] 76 S.Ct. 428, 99 L.Ed. 255, rehearing denied 76 S.Ct. 898, 349 U.S. 913, 99 L.Ed. 1247.

precedents of other statutory service provisions in areas of unusual Federal interest. See, for example, 8 U.S.C. 1105a(3) and 15 U.S.C. 21(f) and 77v.

(a) *Service on Foreign States and Political Subdivisions.*—Subsection (a) of section 1608 sets forth the exclusive procedures for service on a foreign state, or political subdivision thereof, but not on an agency or instrumentality of a foreign state which is covered in subsection (b). There is a hierarchy in the methods of service. Paragraph (1) provides for service in accordance with any special arrangement which may have been agreed upon between a plaintiff and the foreign state or political subdivision. If such an arrangement exists, service must be made under this method. The purpose of subsection (a)(1) is to encourage potential plaintiffs and foreign states to agree to a procedure on service.

If no special arrangement exists, paragraph (2) would permit service in accordance with an applicable international convention on service of judicial documents. The only such convention to which the United States is at present a party is the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, 20 UST 361, TIAS 6638 (1969). In order for an international convention to be "applicable", both the United States and the foreign state concerned must be a party to the convention.

If neither an applicable international convention nor a special arrangement exists, paragraph (3) would provide for service by mail. The clerk of the court would send a copy of a "notice of suit" as prescribed by the Secretary of State by regulation, together with a copy of the summons and complaint, by mail to the head of the foreign state's ministry of foreign affairs or its equivalent. This procedure is based on rule 4(i)(1)(D), F.R. Civ. P.

Finally, as a method of last resort, paragraph (4) would provide for service through diplomatic channels if service could not be made by mail within 30 days. The clerk of the court would send two copies of the notice of suit, summons and complaint to the Secretary of State for transmittal through diplomatic channels. Transmittal through diplomatic channels would mean that the Office of Special Consular Services in the Department of State will pouch a copy of these papers to the U.S. Embassy in the foreign state in question. The U.S. Embassy, in turn, would prepare a diplomatic note of transmittal and deliver the diplomatic note with the other papers to the appropriate official in the ministry of foreign affairs of the foreign state. Use of diplomatic channels could also include transmittal of the papers by the Department of State to the foreign state's embassy in Washington, D.C. "Transmittal" of the notice of suit, summons and complaint does not require that the foreign state formally accept these papers. It only requires that these papers be transmitted in such a way that the foreign state has actual notice of the suit. All papers to be served would be accompanied by translations into an official language of the foreign state. Finally, the Secretary of State would be required to send back to the court the diplomatic note used in transmitting the papers to the foreign state.

A "notice of suit" as used in this section would advise a foreign state of the legal proceeding, it would explain the legal significance of the summons, complaint and service, and it would indicate what

steps are available under or required by U.S. law in order to defend the action. In short, it would provide an introductory explanation to a foreign state that may be unfamiliar with U.S. law or procedures.

Service through diplomatic channels is widely used in international practice. It is provided for in the European Convention on State Immunity, *supra*, which was negotiated by 18 European nations. It is accepted and indeed preferred by the United States in suits brought against the United States Government in foreign courts. See Department of State's circular instruction No. CA-10922, June 16, 1961, 56 Am. J. Int'l L. 523–33 (1962).

(b) *Service on Agencies or Instrumentalities.*—Subsection (b) of section 1608 provides the methods under which service shall be made upon an agency or instrumentality of a foreign state, as defined in section 1603(b). Again, service must always be made in accordance with any special arrangement for service between a plaintiff and the agency or instrumentality. If no such arrangement exists, then service must be made under subsection (b)(2) which provides for service upon officers, or managing, general or appointed agents in the United States of the agency or instrumentality—or in the alternative, in accordance with an applicable international convention such as the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, *supra*.

If there is no special arrangement and if the agency or instrumentality has no representative in the United States, service may be made under one of the three methods provided in subsection (b)(3). The first two methods provide for service by letter rogatory or request or by mail. The third method, subparagraph (C), authoizes a court to fashion a method of service, for example under rule 83, F.R. Civ. P., provided the method is "consistent with the law of the place where service is to be made." This latter language takes into account the fact that the laws of foreign countries may prohibit the service in their country of judicial documents by process servers from the United States. It is contemplated that no court will direct service upon a foreign state by appointing someone to make a physical attempt at service abroad, unless it is clearly consistent with the law of the foreign jurisdiction where service is to be attempted. It is also contemplated that the courts will not direct service in the United States upon diplomatic representatives, *Hellenic Lines Ltd.* v. *Moore*, 345 F. 2d 978 (D.C. Cir. 1965), or upon consular representatives, *Oster* v. *Dominion of Canada*, 144 F. Supp. 746 (N.D.N.Y. 1956), *aff'd*, 236 F. 2d 400 (2d Cir. 1956).

(c) *When Service Is Made.*—Subsection (c) of section 1608 establishes the time when service shall be deemed to have been made under each of the methods provided in subsections (a) and (b).

(d) *Time To Answer or Reply.*—Subsection (d) of section 1608 gives each foreign state, political subdivision thereof or agency or instrumentality of a foreign state or political subdivision up to 60 days from the time service is deemed to have been made in which to answer or file a responsive pleading. This corresponds to similar provisions applicable in suits against the United States or its officers or agencies. Rule 12(a), F.R. Civ. P.

(e) *Default Judgments.*—Subdivision (e) of section 1608 provides that no default judgment may be entered against a foreign state, or

its political subdivisions, agencies or instrumentalities, "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." This is the same requirement applicable to default judgments against the U.S. Government under rule 55(e), F.R. Civ. P. In determining whether the claimant has established his claim or right to relief, it is expected that courts will take into account the extent to which the plaintiff's case depends on appropriate discovery against the foreign state.[3] Once the default judgment is entered, notice of such judgment must be sent in the manner prescribed for service in sections 1608(a) or (b).

Special note should be made of two means which are currently in use in attempting to commence litigation against a foreign state. First, the current practice of attempting to commence a suit by attachment of a foreign state's property would be prohibited under section 1609 in the bill, because of foreign relations considerations and because such attachments are rendered unnecessary by the liberal service and jurisdictional provisions of the bill. See the analysis to section 1609.

A second means, of questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations, 23 UST 3227, TIAS 7502 (1972), which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill. See 71 Dept. of State Bull. 456–59 (1974).

Section 1609. Immunity from Attachment and Execution of Property of a Foreign State

As in the case of section 1604 of the bill with respect to jurisdiction, section 1609 states a general proposition that the property of a foreign state, as defined in section 1603(a), is immune from attachment and from execution, and then exceptions to this proposition are carved out in sections 1610 and 1611. Here, it should be pointed out that neither section 1610 nor 1611 would permit an attachment for the purpose of obtaining jurisdiction over a foreign state or its property. For this reason, section 1609 has the effect of precluding attachments as a means for commencing a lawsuit.

Attachment of foreign government property for jurisdictional purposes has been recognized "where under international law a foreign government is not immune from suit", and where the property in the United States is commercial in nature. *Weilamann* v. *Chase Manhattan Bank*, 21 Misc. 2d 1056, 192 N.Y.S. 2d 469 (Sup. Ct. N.Y. 1959). Even in such cases, however, it has been recognized that property attached for jurisdictional purposes cannot be retained to satisfy a judgment because, under current practice, the property of a foreign sovereign is immune from execution.

Attachments for jurisdictional purposes have been criticized as involving U.S. courts in litigation not involving any significant U.S. interest or jurisdictional contacts, apart from the fortuitous presence of property in the jurisdiction. Such cases frequently require the application of foreign law to events which occur entirely abroad.

[3] Cf. Statement in the analysis of section 1608 noting that appropriate remedies would be available under Rule 37, F.R. Civ. P., for an unjustifiable failure to make discovery.

Such attachments can also give rise to serious friction in United States' foreign relations. In some cases, plaintiffs obtain numerous attachments over a variety of foreign government assets found in various parts of the United States. This shotgun approach has caused significant irritation to many foreign governments.

At the same time, one of the fundamental purposes of this bill is to provide a long-arm statute that makes attachment for jurisdictional purposes unnecessary in cases where there is a nexus between the claim and the United States. Claimants will clearly benefit from the expanded methods under the bill for service on a foreign state (sec. 1608), as well as from the certainty that section 1330(b) of the bill confers personal jurisdiction over a foreign state in Federal and State courts as to every claim for which the foreign state is not entitled to immunity. The elimination of attachment as a vehicle for commencing a lawsuit will ease the conduct of foreign relations by the United States and help eliminate the necessity for determinations of claims of sovereign immunity by the State Department.

Section 1610. Exceptions to Immunity from Attachment or Execution

Section 1610 sets forth circumstances under which the property of a foreign state is not immune from attachment or execution to satisfy a judgment. Though the enforcement or judgments against foreign state property remains a somewhat controversial subject in international law, there is a marked trend toward limiting the immunity from execution.

A number of treaties of friendship, commerce and navigation concluded by the United States permit execution of judgments against foreign publicly owned or controlled enterprises (for example, Treaty with Japan, April 2, 1953, art. 18(2), 4 UST 2063, TIAS 2863). The widely ratified Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels, April 10, 1926, 196 L.N.T.S. 199, allows execution of judgments against public vessels engaged in commercial services in the same way as against privately owned vessels. Although not a party to this treaty, the United States follows a policy of not claiming immunity for its publicly-owned merchant vessels, both domestically, 46 U.S.C. 742, 781, and abroad, 46 U.S.C. 747; 2 Hackworth, Digest of International Law, 435–39 (1941). Articles 20 and 21 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 UST 1606, TIAS 5639, to which the United States is a party, recognize the liability to execution under appropriate circumstances of state-owned vessels used in commercial service.

However, the traditional view in the United States concerning execution has been that the property of foreign states is absolutely immune from execution. *Dexter and Carpenter, Inc.* v. *Kunglig Jarnvagsstyrelsen*, 43 F. 2d 705 (2d Cir. 1930). Even after the "Tate Letter" of 1952, this continued to be the position of the Department of State and of the courts. See, *Weilamann* v. *Chase Manhattan Bank*, 21 Misc. 2d 1066, 192 N.Y.S. 2d 469, 473 (Sup. Ct. N.Y. 1959). Sections 1610(a) and (b) are intended to modify this rule by partially lowering the barrier of immunity from execution, so as to make this immunity conform more closely with the provisions on jurisdictional immunity in the bill.

(a) *Execution Against Property of Foreign States.* Section 1610(a) relates to execution against property of a foreign state, including a political subdivision, agency, or instrumentality of a foreign state. The term "attachment in aid of execution" is intended to include attachments, garnishments, and supplemental proceedings available under applicable Federal or State law to obtain satisfaction of a judgment. See rule 69, F.R. Civ. P. The property in question must be used for a commercial activity in the United States. If so, attachment in aid of execution, and execution, upon judgments entered by Federal or State courts against the foreign state would be permitted in any of the circumstances set forth in paragraphs (1)–(5) of section 1610(a).

Paragraph (1) relates to explicit and implied waivers, and is governed by the same principles that apply to waivers of immunity from jurisdiction under section 1605(a)(1) of the bill. A foreign state may have waived its immunity from execution, *inter alia*, by the provisions of a treaty, a contract, an official statement, or certain steps taken by the foreign state in the proceedings leading to judgment or to execution. As in section 1605(a)(1), a waiver on behalf of an agency or instrumentality of a foreign state may be made either by the agency or instrumentality or by the foreign state itself.

Paragraph (2) of section 1610(a) denies immunity from execution against property used by a foreign state for a commercial activity in the United States, provided that the commercial activity gave rise to the claim upon which the judgment is based. Included would be commercial activities encompassed by section 1605(a)(2). The provision also includes a commercial activity giving rise to a claim with respect to which the foreign state has waived immunity under section 1605(a)(1). In addition, it includes a commercial activity which gave rise to a maritime lien with respect to which an admiralty suit was brought under section 1605(b). One could, of course, execute against commercial property other than a vessel or cargo which is the subject of a suit under section 1605(b), provided that the property was used in the same commercial activity upon which the maritime lien was based.

The language "is or was used" in paragraph (2) contemplates a situation where property may be transferred from the commercial activity which is the subject of the suit in an effort to avoid the process of the court. This language, however, does not bear on the question of whether particular property is to be deemed property of the entity against which the judgment was obtained. The courts will have to determine whether property "in the custody of" an agency or instrumentality is property "of" the agency or instrumentality, whether property held by one agency should be deemed to be property of another, whether property held by an agency is property of the foreign state. See *Prelude Corp.* v. *Owners of F/V Atlantic*, 1971 A.M.C. 2651 (N.D. Calif.); *American Hawaiian Ventures* v. *M.V. J. Latuharhary*, 257 F. Supp. 622, 626 (D.N.J. 1966).

Paragraph (3) would deny immunity from execution against property of a foreign state which is used for a commercial activity in the United States and which has been taken in violation of international law or has been exchanged for property taken in violation of international law. See the analysis to section 1605 (a)(3).

Paragraph (4) would deny immunity from execution against property of a foreign state which is used for a commercial activity in the United States and is either acquired by succession or gift or is immovable. Specifically exempted are diplomatic and consular missions and the residences of the chiefs of such missions. This exemption applies to all of the situations encompassed by sections 1610 (a) and (b); embassies and related buildings could not be deemed to be property used for a "commercial" activity as required by section 1610(a); also, since such buildings are those of the foreign state itself, they could not be property of an agency or instrumentality engaged in a commercial activity in the United States within the meaning of section 1610(b).

Paragraph (5) of section 1610(a) would deny immunity with respect to obligations owed to a foreign state under a policy of liability insurance. Such obligations would after judgment be treated as property of the foreign state subject to garnishment or related remedies in aid or in place of execution. The availability of such remedies would, of course, be governed by applicable State or Federal law. Paragraph (5) is intended to facilitate recovery by individuals who may be injured in accidents, including those involving vehicles operated by a foreign state or by its officials, or employees acting within the scope of their authority.

(b) *Additional Execution Against Agencies and Instrumentalities Engaged in Commercial Activity in the United States.*—Section 1610 (b) provides for execution against the property of agencies or instrumentalities of a foreign state in circumstances additional to those provided in section 1610(a). However, the agency or instrumentality must be engaged in a commercial activity in the United States. If so, the plaintiff may obtain an attachment in aid of execution or execution against *any* property, commercial and noncommercial, of the agency or instrumentality, but only in the circumstances set forth in paragraphs (1) and (2).

Paragraph (1) denies immunity from execution against any property of an agency or instrumentality engaged in a commercial activity in the United States, where the agency or instrumentality has waived its immunity from execution. See the analysis to paragraph (1) of section 1610(a).

Paragraph (2) of section 1610(b) denies immunity from execution against any property of an agency or instrumentality engaged in a commercial activity in the United States in order to satisfy a judgment relating to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3) or (5), or 1605(b). Property will be subject to execution irrespective of whether the property was used for the same commercial or other activity upon which the claim giving rise to the judgment was based.

Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. See *Prelude Corp.* v. *Owners of F/V Atlantic*, 1971 A.M.C. 2651 (N.D. Calif.). There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between differ-

ent U.S. corporations or between a U.S. corporation and its independent subsidiary. However, a court might find that property held by one agency is really the property of another. See the analysis to section 1610(a) (2).

(c) *Necessity of court order following reasonable notice.*—Section 1610(c) prohibits attachment or execution under sections 1610(a) and (b) unless the court has issued an order for such attachment and execution. In some jurisdictions in the United States, attachment and execution to satisfy a judgment may be had simply by applying to a clerk or to a local sheriff. This would not afford sufficient protection to a foreign state. This subsection contemplates that the courts will exercise their discretion in permitting execution. Prior to ordering attachment and execution, the court must determine that a reasonable period of time has elapsed following the entry of judgment, or in cases of a default judgment, since notice of the judgment was given to the foreign state under section 1608(e). In determining whether the period has been reasonable, the courts should take into account procedures, including legislation, that may be necessary for payment of a judgment by a foreign state, which may take several months; representations by the foreign state of steps being taken to satisfy the judgment; or any steps being taken to satisfy the judgment; or evidence that the foreign state is about to remove assets from the jurisdiction to frustrate satisfaction of the judgment.

(d) *Attachments upon explicit waiver to secure satisfaction of a judgment.*—Section 1610(d) relates to attachment against the property of a foreign state, or of a political subdivision, agency or instrumentality of a foreign state, prior to the entry of judgment or prior to the lapse of the "reasonable period of time" required under section 1610(c). Immunity from attachment will be denied only if the foreign state, political subdivision, agency or instrumentality has explicitly waived its immunity from attachment prior to judgment, and only if the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state and not to secure jurisdiction. This subsection provides, in cases where there has been an explicit waiver, a provisional remedy, for example to prevent assets from being dissipated or removed from the jurisdiction in order to frustrate satisfaction of a judgment.

Section 1611. Certain types of property immune from execution

Section 1611 exempts certain types of property from the immunity provisions of section 1610 relating to attachment and exectuion.

(a) *Property held by international organizations.*—Section 1611 (a) precludes attachment and execution against funds and other property of certain international organizations. The purpose of this subsection is to permit international organizations designated by the President pursuant to the International Organizations Immunities Act, 22 U.S.C. 288, *et seq.*, to carry out their functions from their offices located in the United States without hindrance by private claimants seeking to attach the payment of funds to a foreign state; such attachments would also violate the immunities accorded to such international institutions. See also article 9, section 3 of the Articles of Agreement of the International Monetary Fund, TIAS 1501, 60 Stat. 1401. International organizations covered by this provision would include,

inter alia, the International Monetary Fund and the World Bank. The reference to "international organizations" in this subsection is not intended to restrict any immunity accorded to such international organizations under any other law or international agreement.

(b) *Central bank funds and military property.*—Section 1611(b)(1) provides for the immunity of central bank funds from attachment or execution. It applies to funds of a foreign central bank or monetary authority which are deposited in the United States and "held" for the bank's or authority's "own account"—i.e., funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states. If execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems.

Section 1611(b)(2) provides immunity from attachment and execution for property which is, or is intended to be, used in connection with a military activity and which fulfills either of two conditions: the property is either (A) of a military character or (B) under the control of a military authority or defense agency. Under the first condition, property is of a military character if it consists of equipment in the broad sense—such as weapons, ammunition, military transport, warships, tanks, communications equipment. Both the character and the function of the property must be military. The purpose of this condition is to avoid frustration of United States foreign policy in connection with purchases of military equipment and supplies in the United States by foreign governments.

The second condition is intended to protect other military property, such as food, clothing, fuel and office equipment which, although not of a military character, is essential to military operations. "Control" is intended to include authority over disposition and use in addition to physical control, and a "defense agency" is intended to include civilian defense organizations comparable to the Defense Supply Agency in the United States. Each condition is subject to the overall condition that property will be immune only if its present or future use is military (e.g., surplus military equipment withdrawn from military use would not be immune). Both conditions will avoid the possibility that a foreign state might permit execution on military property of the United States abroad under a reciprocal application of the act.

SEC. 8. VENUE

This section amends 28 U.S.C. § 1391, which deals with venue generally. Under the new subsection (f), there are four express provisions for venue in civil actions brought against foreign states, political subdivisions or their agencies or instrumentalities.

(1) The action may be brought in the judicial district wherein a substantial part of the events or omissions giving rise to the claim occurred." This provision is analogous to 28 U.S.C. § 1391(e), which allows an action against the United States to be brought, *inter alia*, in any judicial district in which "the cause of action arose." The test adopted, however, is the newer test recommended by the American Law Institute and incorporated in S. 1876, 92d Congress, 1st session, which

does not imply that there is only one such district applicable in each case. In cases under section 1605(a)(2), involving a commercial activity abroad that causes a direct effect in the United States, venue would exist wherever the direct effect generated "a substantial part of the events" giving rise to the claim.

In cases where property or rights in property are involved, the action may be brought in the judicial district in which "a substantial part of the property that is the subject of the action is situated." No hardship will be caused to the foreign state if it is subject to suit where it has chosen to place the property that gives rise to the dispute.

(2) If the action is a suit in admiralty to enforce a maritime lien against a vessel or cargo of a foreign state, and if the action is brought under the new section 1605(b) in this bill, the action may be brought in the judicial district in which the vessel or cargo is situated at the time notice is delivered pursuant to section 1605(b)(1).

(3) If the action is brought against an agency or instrumentality of a foreign state, as defined in the new section 1603(b) in the bill, it may be brought in the judicial district where the agency or instrumentality is licensed to do business or is doing business. This provision is based on 28 U.S.C. § 1391(c).

(4) If the action is brought against a foreign state or political subdivision, it may be brought in the U.S. District Court for the District of Columbia. It is in the District of Columbia that foreign states have diplomatic representatives and where it may be easiest for them to defend. New subsection (f) would, of course, not apply to entities that are owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332 (c) and (d). For purposes of this bill, such entities are not agencies or instrumentalities of a foreign state. (See the analysis to sec. 1603(b).)

As with other provisions in 28 U.S.C. 1391, venue in any court could be waived by a foreign state, such as by failing to object to improper venue in a timely manner. (See rule 12(h), F.R. Civ. P.)

SEC. 6. REMOVAL OF CASES FROM STATE COURTS

The bill adds a new provision to 28 U.S.C. 1441 to provide for removal to a Federal district court of civil actions brought in the courts of the States against a foreign state or a political subdivision, agency or instrumentality of a foreign state. In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts. New subsection (d) of section 1441 permits the removal of any such action at the discretion of the foreign state, even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the State in which the action has been brought.

As with other removal provisions, a petition for removal must be filed with the appropriate district court in a timely manner. (28 U.S.C. 1446.) However, in view of the 60-day period provided in section 1608(c) in the bill and in view of the bill's preference that actions involving foreign states be tried in federal courts, the time limitations for filing a petition of removal under 28 U.S.C. 1446 may be extended "at any time" for good cause shown.

Upon removal, the action would be heard and tried by the appropriate district court sitting without a jury. (*Cf.* 28 U.S.C. 2402, precluding jury trials in suits against the United States.) Thus, one effect of removing an action under the new section 1441(d) will be to extinguish a demand for a jury trial made in the state court. (*Cf.* rule 81(c), F.R. Civ. P.) Because the judicial power of the United States specifically encompasses actions "between a State, or the Citizens thereof, and foreign States" (U.S. Constitution, art. III, sec. 2, cl. 1), this preemption of State court procedures in cases involving foreign sovereigns is clearly constitutional.

This section, again, would not apply to entities owned by a foreign state which are citizens of a State of the United States as defined in 28 U.S.C. 1332 (c) and (d), or created under the laws of a third country.

SEC. 7. SEVERABILITY OF PROVISIONS

This action provides that if a portion of the act or any application of the act should be found invalid for any reason, such invalidity would not affect any other provision or application of the act.

SEC. 8. EFFECTIVE DATE

This section establishes that the effective date of the act shall be 90 days after it becomes law. A 90-day period is deemed necessary in order to give adequate notice of the act and its detailed provisions to all foreign states.

STATEMENTS UNDER CLAUSE 2(l)(2)(B), CLAUSE 2(l)(3) AND CLAUSE 2(l)(4) OF RULE XI AND CLAUSE 7(a)(1) OF RULE XIII OF THE HOUSE OF REPRESENTATIVES

COMMITTEE VOTE

(Rule XI 2(l)(2)(B))

On September 9, 1976, the Full Committee on the Judiciary approved the bill H.R. 11315 by voice vote.

COST

(Rule XIII 7(a)(1))

The enactment of this bill will not require any new or additional authorization or appropriation of funds. Indeed, the enactment of the bill will result in a net saving, in an undetermined amount, in that the Department of State will no longer have to undertake a consideration of diplomatic requests for sovereign immunity, and the Department of Justice will not be required to appear in the courts in support of the suggestions of immunity that are filed pursuant to the Department of State's sovereign immunity determinations.

OVERSIGHT STATEMENT

(Rule XI 2(l)(3)(A))

The Subcommittee on Administrative Law and Governmental Relations of this committee exercises the committee's oversight responsi-

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bility with reference matters involving the immunity of foreign states, in accordance with Rule VI(b) of the Rules of the Committee on the Judiciary. The favorable consideration of this bill was recommended by that subcommittee and the committee has determined that legislation should be enacted as set forth in this bill.

BUDGET STATEMENT

(Rule XI 2(l)(3)(B))

As has been indicated in the committee statement as to cost made pursuant to Rule XIII (7)(a)(1), the bill will not require any new or additional authorization or appropriation of funds. The bill does not involve new budget authority nor does it require new or increased tax expenditures as contemplated by Clause 2(l)(3)(B) of Rule XI.

ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

(Rule XI 2(l)(3)(C))

The estimate received from the Director of the Congressional Budget Office is as follows:

CONGRESS OF THE UNITED STATES.
CONGRESSIONAL BUDGET OFFICE.
Washington, D.C., July 6, 1976.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: In response to your letter of June 10, 1976 and pursuant to section 403 of the Congressional Budget Act, the Congressional Budget Office has analyzed the costs associated with H.R. 11315, the "Foreign Sovereign Immunities Act of 1976." This legislation is estimated to have no budgetary impact.

Should the committee so desire, we would be pleased to provide additional assistance on this and future legislation.

Sincerely,

ALICE M. RIVLIN,
Director.

OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS

(Rule XI 2(l)(3)(D))

No findings or recommendations of the Committee on Government Operations were received as referred to in subdivision (D) of clause 2(l)(3) of House Rule XI.

INFLATIONARY IMPACT

(Rule XI 2(l)(3))

In compliance with clause 2(l)(4) of House Rule XI it is stated that this legislation will have no inflationary impact on prices and costs in the operation of the national economy.

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[The executive communication from the Departments of State and Justice is as follows:]

DEPARTMENT OF STATE.
Washington, D.C., October 31, 1975.

Hon. CARL O. ALBERT,
Speaker of the House of Representatives.

DEAR MR. SPEAKER: The Department of State and Department of Justice submit for your consideration and appropriate reference the

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enclosed draft bill, entitled "To define the circumstances in which foreign states are immune from the jurisdiction of U.S. courts and in which execution may not be levied on their assets, and for other purposes." This is a proposed revision of the draft bill which was submitted in a letter (enclosed) to you dated January 16, 1973, and subsequently introduced by Chairman Peter W. Rodino, Jr., and Congressman Edward Hutchinson as H.R. 3493. A revised section-by-section analysis explaining the provisions of the bill in some detail is also enclosed. A hearing was held on H.R. 3493 before the Subcommittee on Claims and Governmental Relations of the Committee of the Judiciary in the House of Representatives in the 1st session of the 93d Congress on June 7, 1973.

The broad purposes of this legislation—to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation—remain the same. To this end the revised bill, like its predecessor, would entrust the resolution of questions of sovereign immunity to the judicial branch of Government. The statute would codify and refine the "restrictive theory" of sovereign immunity which has guided United States practice with respect to jurisdiction originally set forth in the letter of May 19, 1952, from the Acting Legal Adviser, Jack B. Tate, to the Acting Attorney General, Philip B. Perlman. It would also replace the absolute immunity now accorded foreign states from execution of judgment with an immunity from execution conforming more closely to the restrictive theory of immunity from jurisdiction. The measure also includes provisions for service of process, venue, and jurisdiction in cases against foreign states which would make it unnecessary to attach the assets of foreign states for purposes of jurisdiction.

Numerous technical changes have been made in the bill on the basis of the hearing in the House of Representatives, commentaries in a number of legal journals, and extensive discussions which have been held with members of the bar as well as the reports and recommendations of committees of several bar associations. A number of these technical revisions are important, but none of them alters the basic concept of the legislation as originally submitted.

The most important changes include (1) further definition of "commercial activity carried on in the United States by a foreign state" and "public debt" in section 1603; (2) clarification of the limitations of immunity in tort actions (sec. 1605(5)), in respect of counterclaims (sec. 1607), and in case of execution of judgment (sec. 1610); and (3) substantial revision of section 1608 relating to service of process to conform with article XXII of the Convention on Diplomatic Relations, signed at Vienna April 18, 1961, and with the Federal Rules of Civil Procedure.

In addition, important new provisions have been added to preserve the jurisdiction of the courts of the United States in cases in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of a foreign state (sec. 1605(b)), and to avoid interference with disbursements to foreign states by certain international organizations located in the United States (sec. 1611(a)). These and other changes are discussed in the enclosed analysis.

The Departments of State and Justice believe that this revised draft bill is worthy of and will receive the support of the bar and would

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welcome hearings before the appropriate committees of the House to consider this measure as soon as possible.

The Office of Management and Budget has advised that there is no objection to the enactment of this legislation from the standpoint of the administration's program.

Sincerely,

ROBERT S. INGERSOLL,
Deputy Secretary of State.
HAROLD R. TYLER, JR.,
Deputy Attorney General.

* * * * * * * * * *

Opposition

Supreme Court, U.S.
FILED
MAR 22 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1300

In the Supreme Court of the United States

OCTOBER TERM, 1981

CALVIN REX, PETITIONER

v.

CIA. PERVANA DE VAPORES, S.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Amendment requires jury trials in suits against instrumentalities of foreign states under the Foreign Sovereign Immunities Act of 1976.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1300

CALVIN REX, PETITIONER

v.

CIA. PERVANA DE VAPORES, S.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 660 F. 2d 61. The opinion of the district court (Pet. App. 39a-77a) is reported at 493 F. Supp. 459.

JURISDICTION

The judgment of the court of appeals (Pet. App. 35a-36a) was entered on September 17, 1981. A petition for rehearing was denied on October 22, 1981 (Pet. App. 37a-38a). The petition for a writ of certiorari was filed on January 11, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Calvin Rex, a longshoreman, was injured while unloading cargo from a ship owned by respondent, Compania Pervana de Vapores, S.A. Respondent is a Peruvian corporation whose stock is wholly owned by the sovereign state of Peru. Petitioner sued for damages in the United States District Court for the Eastern District of Pennsylvania under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 905(b), alleging jurisdiction based on diversity of citizenship, 28 U.S.C. 1332, the existence of a federal question, 28 U.S.C. 1331, and the fact that he was suing a foreign sovereign, 28 U.S.C. 1330(a). Included in his claim for relief was a demand for jury trial. Because petitioner challenged the constitutionality of the Foreign Sovereign Immunities Act of 1976 (FSIA) insofar as it precluded a jury trial, the United States intervened pursuant to 28 U.S.C. 2403(a) to defend the statute (Pet. App. 3a).

The district court granted petitioner's demand for a jury trial. The court expressed concern that interpreting 28 U.S.C. 1330(a) as the exclusive basis for federal jurisdiction over actions against foreign states would unconstitutionally deprive plaintiffs of their Seventh Amendment right to a jury trial (Pet. App. 49a-61a). To avoid this constitutional infirmity, the court concluded that 28 U.S.C. 1331 and 1332 allow jurisdiction over civil actions against the commercial enterprises of foreign states, assuming the other requirements of those sections are met, and that the enactment of the FSIA did not eliminate the right to a jury trial under those sections (Pet. App. 62a-74a).

2. The court of appeals allowed an interlocutory appeal to determine whether all actions brought under 28 U.S.C. 1330(a) must be tried without a jury and, if so, whether the FSIA is consistent with the Seventh Amendment (Pet. App. 2a-3a). The court of appeals first concluded that 28 U.S.C.

1330(a) is the exclusive basis for jurisdiction over foreign states and their instrumentalities and that that section precludes trial by jury (Pet. App. 6a-9a). The court then held that the Seventh Amendment does not require jury trials in actions against foreign states under the FSIA, because such actions are not "Suits at common law" within the meaning of the Seventh Amendment (*id.* at 9a-19a).[1]

ARGUMENT

The decision of the court of appeals is correct and is consistent with decisions of the Second and Fourth Circuits in virtually identical cases. It does not merit review by this Court.

1. The FSIA was enacted to define in a comprehensive way "when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6. (1976). The Act states in 28 U.S.C. 1330(a) that the district courts shall have jurisdiction of "nonjury" civil actions against "foreign states" (defined in 28 U.S.C. 1603 to include foreign state-owned entities), as to any claim for which the foreign state is not entitled to immunity.[2] It is clear that Congress meant Section 1330 to be the exclusive basis for federal jurisdiction over suits against foreign states and their instrumentalities. It is equally clear that Congress

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[1]Judge Sloviter, dissenting, rejected the majority's "identification of the foreign state with commercial corporations in which the foreign state has an interest" (Pet. App. 27a). To the extent that the FSIA deprives plaintiffs seeking damages of a jury trial in cases against foreign state-owned corporations, she would have held the Act unconstitutional (Pet. App. 33a).

[2]The conditions governing immunity are defined in 28 U.S.C. 1605-1607 and by applicable international agreements. Foreign states are not immune from actions based on commercial activities carried on in the United States. 28 U.S.C. 1605(a)(2).

intended to preclude jury trials in such actions. Petitioner does not contest the court of appeals' decision on these issues.

2. The FSIA's preclusion of jury trials does not violate the Seventh Amendment. The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *." The phrase "Suits at common law" was not intended to encompass suits against foreign states, because such suits were unknown at common law due to the doctrine of sovereign immunity. *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 136-137 (1812). Thus, in 1791, when the Seventh Amendment was adopted, there was no right of jury trial to be preserved. That the immunity of foreign sovereigns extended to such activities as commercial shipping was affirmed by this Court in *Berizzi Brothers Co.* v. *S.S. Pesaro*, 271 U.S. 562, 574 (1926).

More recently, this Court decided that the immunity of foreign sovereigns for their commercial activities should not be absolute, but rather should depend on the effect that the State Department determined a suit would have on the foreign relations of the United States. *Republic of Mexico* v. *Hoffman*, 324 U.S. 30 (1945); *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943). This restrictive theory of sovereign immunity was officially embraced in the State Department's "Tate Letter," 26 Dep't State Bull. 984 (1952), which announced a policy of denying immunity to commercial activities of foreign states or entities controlled by them. See *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 698 (1976). The FSIA was intended to codify the restrictive theory of immunity announced in the Tate Letter and to depoliticize the issue of sovereign immunity by reposing in the judiciary, rather than the executive branch, the duty to decide whether in a given case a foreign sovereign is entitled to immunity. H.R. Rep. No. 94-1487, *supra*, at 7-8.

Although it codified the denial of immunity for commercial activities, Congress decided for compelling reasons to subject foreign sovereigns to suit only in nonjury civil actions. The provision for trial by a court was thought to "be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." H.R. Rep. No. 94-1487, *supra*, at 13. Nonjury trials also provide some protection against any inclination of juries to be too generous with monetary awards, and Congress apparently wished to extend to foreign sovereigns the same safeguard it affords the United States, whose waiver of immunity is usually coupled with a requirement of nonjury trial. *Ruggiero* v. *Compania Peruana de Vapores*, 639 F. 2d 872, 880 (2d Cir. 1981). See *Lehman* v. *Nakshian*, No. 80-242 (June 26, 1981), slip op. 5. Moreover, as the court of appeals observed (Pet. App. 17a-18a), Congress undoubtedly intended to avoid the suspicions that might be entertained about the wisdom and objectivity of the jury system by foreign states accustomed to the civil law tradition and unfamiliar with the use of juries in civil actions. Such a step might be necessary to render the abrogation of immunity acceptable to foreign governments, "particularly those which may fear that at one time or another they may be politically unpopular with Americans." *Ruggiero* v. *Compania Peruana de Vapores*, *supra*, 639 F. 2d at 880 n.12.

There is little merit to the contention that Congress cannot partially abrogate the immunity of foreign sovereigns without providing for a jury trial. This Court has consistently upheld Congress' parallel practice of waiving the sovereign immunity of the United States, but requiring such suits to be decided without a jury. The justification given in such cases has been that, because of the common law doctrine of sovereign immunity, such proceedings "are not suits

at common law within [the] true meaning [of the Seventh Amendment]." *McElrath* v. *United States*, 102 U.S. 426, 440 (1880). See also *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572 (1962) (plurality opinion). As the Court stated in *Galloway* v. *United States*, 319 U.S. 372, 388 (1943):

> [T]he Amendment has no application of its own force to this case. The suit is one to enforce a monetary claim against the United States. It hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign.

See also *Lehman* v. *Nakshian*, *supra*, slip op. 4.

The Second and Fourth Circuits, in cases virtually identical to this one, have confirmed the correctness of the court of appeals' decision. In *Ruggiero* v. *Compania Peruana de Vapores*, *supra*, 639 F. 2d at 872, the Second Circuit held that the Seventh Amendment did not apply to an action for negligence brought by a longshoreman under 33 U.S.C. 905(b) against a commercial shipping company wholly owned by the government of Peru. The court, in an opinion by Judge Friendly, rejected the plaintiffs' claim that the FSIA is unconstitutional insofar as it requires such claims to be brought in nonjury civil actions. Claims against foreign sovereigns, the court concluded, are not "Suits at common law" within the meaning of the Seventh Amendment. 639 F. 2d at 878-880. In *Williams* v. *Shipping Corp. of India*, 653 F. 2d 875 (1981), the Fourth Circuit came to the same conclusion in another action for personal injuries suffered by a longshoreman while working aboard a ship owned by the government of India. The court held that since foreign sovereigns were immune from suit at common law, the plaintiff's action was not covered by the Seventh Amendment's preservation of jury trial. Consequently, the FSIA could properly extend to plaintiffs a right to sue only

in a nonjury action. *Id.* at 881-383. See also *Houston* v. *Murmansk Shipping Co.*, 667 F. 2d 1151 (4th Cir. 1982); Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 Stan. L. Rev. 385, 421-424 (1982).

3. Petitioner contends that jury trials are required in suits against foreign sovereigns, even though they are not required in suits against the United States, because the immunities of foreign and domestic governments rest on different principles. He also argues that, whatever the propriety of disallowing jury trials in cases involving foreign sovereign states themselves, the FSIA unconstitutionally extends the same condition to foreign state-owned corporations. Both contentions are insubstantial.

a. Petitioner claims that the sovereign immunity of the United States derives from the doctrine of separation of powers and from the Article I provision that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." United States Constitution, Article I, Section 9, Clause 7. See Pet. 23; Pet. App. 22a. By contrast, the immunity of foreign states rests not on constitutional requirements but on principles of international law. As Chief Justice Marshall noted, out of respect for the "perfect equality and absolute independence of sovereigns," a host state under international law "is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation," and refrains from bringing a foreign state before its courts. *The Schooner Exchange* v. *McFaddon, supra*, 11 U.S. (7 Cranch) at 136-137.

Petitioner would conclude from this distinction that Congress may withdraw the sovereign immunity of the United States, but not the sovereign immunity of foreign states, on condition that suits be tried without a jury. The reason, though not apparent from the petition, might be that the immunity of the United States—because it has a constitutional foundation—is thought to override the

requirements of the Seventh Amendment, while the immunity of foreign sovereigns—which is not constitutionally secured—cannot. But the point of the comparison is that neither type of suit, for whatever reason, was allowed at common law; hence the Seventh Amendment did not "preserve" a right to jury trial in either class of cases. As this Court stated in *Atlas Roofing Co.* v. *Occupational Safety & Health Review Commission*, 430 U.S. 442, 459 (1977): "The Seventh Amendment was declaratory of the existing law, for it required only that jury trial in suits at common law was to be 'preserved.' It thus did not purport to require a jury trial where none was required before."[3]

b. Petitioner also contends that Congress unconstitutionally included foreign state-owned corporations within the FSIA's definition of a "foreign state," see 28 U.S.C. 1603, and thereby revoked a right to jury trial that existed against such entities before the adoption of the Act (Pet. 31-38). But petitioner has pointed to no case, decided between the adoption of the restrictive immunity doctrine and the passage of the FSIA, holding that there *was* a right to a jury trial against such entities. Cf. *Ruggiero* v. *Compania Peruana de Vapores, supra,* 639 F. 2d at 879; 5 *Moore's Federal Practice* para. 38.31.1[2], at 38-248 (2d ed.

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[3]Nothing in *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974), or *Curtis* v. *Loether*, 415 U.S. 189 (1974), requires a contrary conclusion. Petitioner appears to draw from those cases the principle that any statutorily created cause of action for negligence must be tried before a jury (Pet. 18-19). But as the Second Circuit remarked, in response to a similar argument in *Ruggiero* v. *Compania Peruana de Vapores, supra*, 639 F. 2d at 881 (citations omitted), those cases "mean only that when Congress enlarges domestic substantive law or alters procedure in cases governed by it, the Seventh Amendment protects the right to jury trial if the new substantive right or proceeding is analogous to a suit at common law in 1791. They do not purport to deal with the unusual situation where the bar to a suit at common law was that the defendant, by virtue of its character as a sovereign, was not suable at all." See also *Williams* v. *Shipping Corp. of India, supra,* 653 F. 2d at 883.

1981). In any event, the fact that some courts may have permitted jury trials in actions brought under 28 U.S.C. 1331 and 1332 during that interval should not afford constitutional protection to claims made pursuant to the FSIA. Cf. *Katchen* v. *Landy*, 382 U.S. 323, 331 (1966). The relevant question is whether actions against corporations owned by a foreign sovereign are "Suits at common law," and the mere fact that some jury trials may have taken place in recent years, prior to passage of the FSIA, cannot make them so.

Insofar as petitioner's complaint is aimed at the inclusion of corporations in the coverage of the FSIA, it is misdirected. It is within the control of a foreign sovereign to operate a shipping enterprise, for example, as a wholly owned corporation, as an unincorporated state trading company, or through its department of transportation.[4] The foreign sovereign's amenability to suit in the federal courts should not depend on the mechanism through which it chooses to conduct its operations. Accordingly, Congress in the FSIA deliberately defined " 'agency or instrumentality of a foreign state,' " 28 U.S.C. 1603(b), in a way that would include "a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name." H.R. Rep. No. 94-1487, *supra*, at 16.

c. Petitioner interprets the decision below to hold that "the area of foreign sovereign immunity" is "immune from compliance with constitutional restraints" (Pet. 26-27). But

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[4]See *Oliver American Trading Co.* v. *Mexico*, 5 F. 2d 659, 665-667 (2d Cir. 1924), cert. denied, 267 U.S. 596 (1925), which held that the government of Mexico was immune from suit when operating a national railroad through a government instrumentality created for that purpose.

the court of appeals did not hold that constitutional restraints do not apply to "the area of sovereign immunity." Rather, it concluded simply that a suit against a foreign sovereign or one of its instrumentalities under the FSIA is not a "Suit at common law" within the meaning of the Seventh Amendment. This in no way conflicts with the holding in *Reid* v. *Covert*, 354 U.S. 1 (1957), that civilian military dependents abroad cannot be subjected to a court martial for criminal offenses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

No. 81 - 1300

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In The

Supreme Court of the United States

October Term, 1981

CALVIN REX,

Petitioner,

vs.

CIA. PERVANA DE VAPORES, S.A. ; UNITED STATES OF AMERICA,

Intervenor-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES CITED

Cases:	Page
Curtis v. Loether, 415 U.S. 189 (1974).	5,17
Pernell v. Southall Realty, 416 U.S. 363 (1974) . . .	5,17
Ruggiero v. Campania Peruana de Vapores, 639 F.2d 872 (2nd Cir. 1981)	2,3,4, 6,7,9, 15
The Santissima Trinidad & St. Andre, 20 U.S. (7 Wheaton) 283 (1822). .	8
The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).	3,7
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NO. 81-1300

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CALVIN REX,
Petitioner,

v.

CIA. PERVANA DE VAPORES, S.A.;
UNITED STATES OF AMERICA, Intervenor,
Respondents.

REPLY TO BRIEF IN OPPOSITION

Counsel for the respondent ship-owner has chosen not to submit a brief in opposition, but rather has submitted a letter asserting that there is no conflict in Circuits. At the same time, intervenor-respondent, United States,

has submitted a brief in opposition in which, interestingly enough, it does not attempt to justify the decision below on its own reasoning, but instead relies on the position of the Second Circuit in Ruggiero v. Compania Peruana de Vapores, 639 F.2d 872 (2nd Circuit 1981), a position which was specifically rejected by the court below in the instant case. These tactics serve only to emphasize the error in the decision below.

Contrary to the assertion of the respondent shipowner, there is, in fact, a conflict in Circuits, the conflict being between the Second and Fourth Circuits on the one hand and the Third Circuit on the other, in their reasoning and interpretation of the scope of the

Seventh Amendment.* This conflict, coupled with the dissenting opinion of Judge Sloviter in the court below, demonstrates the significance of the question presented and the importance of this Court granting review.

The Second Circuit in Ruggiero, premised its decision on the statement that ". . . a suit against a foreign state was unknown to the common law," citing The Schooner Exchange v. McFaddon (7 Cranch), 11 U.S. 116, 136-37 (1812), see Ruggiero, 639 F.2d at 878. Counsel for the United States begin their argument with this same assertion, see brief in opposition at page 4. This premise is patently incorrect.

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* The Fourth Circuit's decision in Williams v. Shipping Corp. of India, 653 F.2d 875 (4th Cir. 1981), tracks the Second Circuit's decision in Ruggiero.

Both the Second Circuit in Ruggiero, and counsel for the United States in their brief, recognize, as they must, that, as foreign governments began to engage in commercial activities, a body of law developed which recognized that the immunity of foreign governments from suit was not absolute, and that actions could be maintained against foreign governments under the restrictive theory of sovereign immunity, see Ruggiero, 639 F.2d at 878-879, brief in opposition at page 4. Clearly, this development in the law was a common law development, not a statutory development. Given that it was a common law development, how can the denial of the right to a jury trial in an action against a foreign sovereign be justified on the grounds that such an action did not exist under the common

law? If such actions, when recognized, were not common law actions, then under what law were such actions brought?

The reasoning of the Second Circuit, relied upon by the United States in its brief in opposition, is pinned to the discredited interpretation of the Seventh Amendment as being frozen as of 1791, and encompassing only causes of action which were in existence at that time. This "frozen" interpretation of the Seventh Amendment thawed under the warm rays of reason in Curtis v. Loether, 415 U.S. 189, 194-195 (1974), and Pernell v. Southall Realty, 416 U.S. 363, 374-375 (1974), in which this Court held that the right to a jury trial preserved by the Seventh Amendment "extends beyond the common-law forms of action recognized at that time" to newly created or recognized causes of action

so long as the remedy being sought was a remedy recognized at common law, Ibid.

The Third Circuit, in the decision below, recognized that the Second Circuit's decision in Ruggiero was predicated on this discredited theory that common law causes of action were to be viewed as being frozen as of 1791, and specifically rejected "this static approach to a vital constitutional guarantee" (12a). While, as set forth in the Petition, the panel majority in the Court below moved on to an equally unacceptable interpretation of the Seventh Amendment, it is significant to point out that there is, at the very least, a very real conflict in Circuits with respect to the proper interpretation of the Seventh Amendment.

Since the United States, in its brief in opposition, has chosen to rely

on the Second Circuit's decision in Ruggiero, thereby inferentially rejecting the views of the panel majority in the court below, it is necessary to dwell momentarily on the erroneous assertion that "a suit against a foreign state was unknown to the common law," see Ruggiero, 639 F.2d at 878. The Second Circuit in Ruggiero, and the United States in its brief in opposition, cite The Schooner Exchange v. McFaddon, supra, as support for this assertion, but that decision simply does not so hold. Rather, The Schooner Exchange v. McFaddon holds no more than that the courts of the United States would recognize, as a matter of comity, a privilege of a foreign sovereign not be sued in our courts. However, most important, and a point totally ignored in Ruggiero and by the United States in

its brief in opposition, this privilege of a foreign sovereign not to be sued was not absolute. It could be withdrawn at any time for any reason, or for no reason, a point which was explained in The Santissima Trinidad & The St. Andre, 7 Wheaton 281, 5 L.Ed. 454, 471 (1822), as follows:

> "In the case of The Exchange, 7 Cranch, 116, the grounds of the exemption of public ships were fully discussed and expounded. It was there shown that it was not founded upon any notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory; for that would be to give him sovereign power beyond the limits of his own empire. But it stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction. But as such consent and license is implied only from the general usage of nations, it may be withdrawn

upon notice at any time, without just offense, and if afterwards such public ships come into our ports, they are amenable to our laws in the same manner as other vessels." (Emphasis supplied)

At most, foreign sovereign immunity, even as it existed in 1791, referred to a discretionary declination of jurisdiction over a foreign sovereign. It was not an absolute right of a foreign sovereign not to be sued in our courts. If the exercise of jurisdiction were not declined, then a foreign sovereign could be sued in our courts, and this was as true in 1791 as it has been in modern times under the Tate letter or the restrictive theory of sovereign immunity. The point overlooked by both the Second Circuit in Ruggiero and the United States in its brief in opposition is that even in 1791 a foreign sovereign did not have an absolute right to be immune from suit, and that if immunity were not recognized, then the foreign

sovereign could be held liable in our courts and subject to the common law remedy of an action for damages. Indeed many actions have been so tried, particularly since the publication of the T te letter, with the right of trial by jury being available, and without any protest that the availability of the right to a jury trial in such actions was somehow interfering with our relationships with foreign nations.

The United States, in its brief at page 8, argues that Petitioner does not point to any cases decided prior to the passage of the Foreign Sovereign Immunities Act which held that there was a right to a jury trial against foreign states as defined in the Act. By the same token, however, the United States points to no case decided prior to the Act which held that there was no right

to a jury trial in such cases. In point of fact, large numbers of cases were tried against corporate entities owned by foreign governments under the restrictive theory of sovereign immunity prior to the adoption of the Foreign Sovereign Immunities Act in which jury trials were granted as a matter of course, and the contention that there was no right to a jury trial in such actions was not even raised, let alone sustained.

The United States, in its brief at page 5, also seeks to justify the denial of the right to a jury trial in actions against foreign sovereigns on the supposed need for uniformity of decision in cases involving foreign governments. However, to whatever extent this assumed need for uniformity in decision is a

relevant consideration, it has meaning only with respect to uniformity in the interpretation and application of the Foreign Sovereign Immunities Act itself, and the determination of the circumstances under which immunity would or would not be recognized. Such matters are primarily questions of law and normally would be resolved by the court, whether or not there was a right to a jury trial on factual issues. There is no need for uniformity, nor, indeed, is uniformity possible with respect to questions dealing with substantive liability, as these questions will arise under state law or federal law, as the case may be, and primarily will involve questions of fact. Indeed, in most cases there won't even be an issue as to the interpretation of a Foreign Sovereign Immunities Act as the right to

immunity vel non will be clear from the outset. For example, in the instant case the respondent shipowner has conceded that it is not entitled to the defense of sovereign immunity; it is invoking the Foreign Sovereign Immunities Act solely for the purpose of denying plaintiff the right to a jury trial, and not because it contends that there is an issue as to whether it is immune from liability for a tort committed in this country.

Counsel for the United States also suggest that one of the reasons for denying the right to a jury trial in actions against foreign sovereigns was the fear that juries might be overly generous in their awards while judges might return lower verdicts, brief in opposition, page 5. There are several answers to this contention. First,

there is no reason to believe, nor any proof offered by respondents, that properly instructed juries will render verdicts substantially different in amount from that which would be awarded by a judge acting under the applicable legal principles. Second, there is not the slightest indication in the legislative history of the Foreign Sovereign Immunities Act that such fear of the amount of jury awards was considered to be a relevant factor by Congress in enacting the statute. Third, and most important, the Seventh Amendment was adopted as a recognition of our faith in the jury system and out of fear of those who might attempt to restrict its applicability. Fear of the amount of jury awards, whether such fear is realistic or not, would not justify ignoring the Seventh Amendment.

In Ruggiero, the Second Circuit suggested that the Foreign Sovereign Immunities Act had replaced the familiar dichotomy of federal question and diversity jurisdiction with a tripartite division consisting of federal question cases, diversity cases and actions against foreign sovereigns, see Ruggiero, 639 F.2d at 876. The panel majority in the court below opined that the law of liability of foreign sovereign was "sui generis," "a unique species of public law . . . peculiar only in its characteristic of absolute judicial feality to executive decisionmaking" (17a). The United States, in its brief in opposition, makes no effort to support the correctness of either of these statements, perhaps in the belief that silence is preferable when the alternative is having to defend the undefendable.

The interpretation of the Seventh Amendment does not require resort to such arcane legal theories. The framers of the Seventh Amendment certainly understood the distinction between common law actions and actions in equity. It was not by virtue of a mistake of the pen or an accident of history that Article III, Section 2 of the Constitution, in defining the scope of the federal judicial power, begins: "The Judicial Power shall extend to all Cases in Law and Equity arising under this Constitution, . . ." (Emphasis supplied). Nor were actions against foreign sovereigns unknown to the founding fathers, for Article III, Section 2, concludes with the grant of federal judicial power to controversies ". . . between a State or the Citizens thereof, and foreign states, Citizens or Subjects" (Emphasis supplied).

The Seventh Amendment is not complex. Its language is simple and direct. It preserves the right to a jury trial in actions "at common law," with the distinction being between actions at law and those in equity or of admiralty jurisdiction. See Curtis v. Loether, supra, Pernell v. Southall Realty, supra. There is no separate category of cases consisting of actions against a foreign sovereign, nor were such actions unknown in 1791. The Seventh Amendment is as applicable to actions against foreign sovereigns as it is to actions against other defendants. Actions against the United States stand alone as an exception to this rule for reasons based on political necessity and the historical origins of the liability of the sovereign in its own courts. This exception should not be extended to

foreign sovereigns or their instrumentalities.

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in the Petition, it is respectfully submitted that a Writ of Certiorari should issue to review the decision and judgment of the court below.

Respectfully submitted,

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